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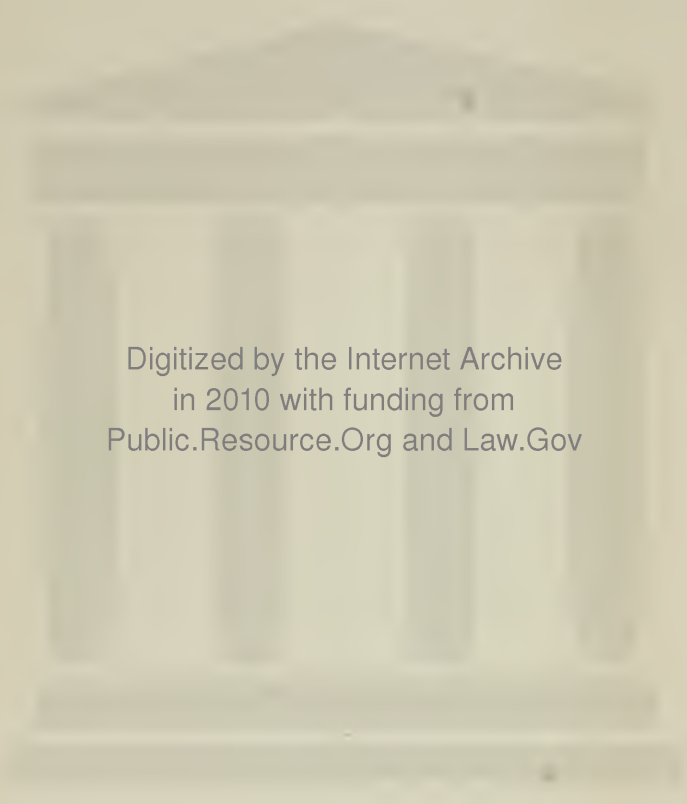
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2962 No. 15032

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

WAYNE A. PARKINSON, an Individual Trading
and Doing Business as Glandular Products
Company and Dybutol Company, and ALLEN
H. PARKINSON, an Individual Trading and
Doing Business as Tide Mailing Service, and
MARGARET M. WILLIS,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

MAY 7 1956

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for the Ninth Circuit

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Affidavits in Support of Prayer for Temporary Restraining Order:

Ebert, Dr. Carl E.	24
Lawson, Dr. Homer C.	20
McGinnis, Dr. James Edward	26
Westrem, Winifred	33
Whittington, Dick	30
Wood, Gordon R.	18

Affidavit in Support of Preliminary Injunction:

Hirsch, Dr. Edwin W.	37
Attorneys, Names and Addresses of	1
Certificate by Clerk	87
Complaint	3
Final Consent Judgment as to Permanent In- junction Only	62
Final Judgment Denying Plaintiff's Prayer for Restitution	85
Minute Order Dated July 25, 1955	73
Notice of Appeal From Final Judgment	87

INDEX	PAGE
Notice of Appeal From Order Granting and Decree of Preliminary Injunction	60
Opinion	74
Order Extending Temporary Restraining Order	43
Order Granting and Decree of Preliminary Injunction	57
Order to Show Cause	36
Preliminary Findings of Fact and Conclusions of Law	44
Statement of Points on Which Appellant Intends to Rely on Appeal	90
Stipulation for Dismissal of Appeal	61
Stipulation and Order Re Issue of Restitution	71
Stipulation and Order for the Use of Original Exhibits in Lieu of Printing	91
Temporary Restraining Order	34

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Los Angeles 13, California.

In the United States District Court for the
Southern District of California, Central Division
Civil Action No. 16415-C

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WAYNE A. PARKINSON, an Individual Trading
and Doing Business as GLANDULAR PROD-
UCTS COMPANY and DYBUTOL COM-
PANY, and ALLEN H. PARKINSON, an In-
dividual Trading and Doing Business as TIDE
MAILING SERVICE, and MARGARET M.
WILLIS,

Defendants.

COMPLAINT FOR INJUNCTION

The United States of America, plaintiff herein, by
and through Laughlin E. Waters, United States At-
torney for the Southern District of California, Cen-
tral Division, files this Complaint for Injunction
and respectfully represents unto this Honorable
Court as follows:

(1) This proceeding is brought under Section
302(a) of the Federal Food, Drug, and Cosmetic
Act [21 U.S.C. 332(a)], hereinafter referred to as
“the Act,” specifically investing the several United
States District Courts with jurisdiction to enjoin
and restrain violations of Section 301 of said Act
[21 U.S.C. 331] as hereinafter more fully appears.

(2) The defendants, Wayne A. Parkinson, an individual trading and doing business as Glandular Products Company and Dybutol Company at 1065 and 1067 East Anaheim Street, Long Beach 13, California, and Allen H. Parkinson, [2*] an individual trading and doing business as Tide Mailing Service at 1065 and 1067 East Anaheim Street, Long Beach 13, California, and Margaret M. Willis, operating manager of Tide Mailing Service at the aforesaid addresses, are the interstate promoters and distributors of articles designated by name as:

- (a) Adler's Compound Standard Strength,
- (b) Adler's Compound Super Strength,
- (c) Vita-Glan Male Formula, Regular Strength,
- (d) Vita-Glan Male Formula, Double Strength,
- (e) Bio-Glan Male Formula, Regular Strength, together with Bio-Glan Fortified Wheat Germ Oil, and
- (f) Bio-Glan Male Formula, Double Strength, together with Bio-Glan Fortified Wheat Germ Oil.

Each of said articles is a drug within the meaning of Section 201(g) of the Act [21 U.S.C. 321(g)].

(3) Defendants Wayne A. Parkinson and Allen H. Parkinson are brothers. The promotion and distribution of the aforesaid drugs are carried out as

*Page numbering appearing at foot of page of original Certified Transcript of Record.

a mail-order business conducted in the name of Glandular Products Company and Dybutol Company, both of which are owned by Wayne A. Parkinson. These two companies have no employees.

(4) Substantially all of the normal business functions of said companies—including the printing, addressing, and mailing of labeling of the aforesaid drugs; the maintenance of extensive mailing lists which defendants have compiled or purchased over a period of years and which include the names and addresses of individuals who have responded in the past to magazine and newspaper advertisements promoting drugs and devices for sexual rejuvenation; the receipt and processing of mail orders for said drugs; the bottling, packaging, and labeling of said drugs; the addressing and shipping of said drugs in response to said mail orders; the maintenance of business records—are performed or arranged for by the Tide Mailing Service.

(5) Said Tide Mailing Service is the fictitious name of an unregistered and unincorporated business operated by Allen H. Parkinson and managed by Margaret M. Willis. The premises occupied by Glandular Products Company and [3] Dybutol Company, at 1065 and 1067 East Anaheim Street, Long Beach, California, are utilized by said Tide Mailing Service in transacting the business operations for said companies as described in paragraph (4) above.

(6) On July 13, 1949, said Allen H. Parkinson, an individual then trading as Hudson Products

Company, was convicted in this Court on four Counts for the distribution of misbranded male and female sex hormones in violation of the Act. [Cause No. 20642-Criminal]. The hormones there involved included methyl testosterone tablets and alpha-estradiol tablets. Said hormones had been offered by said Allen H. Parkinson in a widespread mail-order promotion in which he claimed that said hormones had remarkable powers of sexual rejuvenation. In announcing judgment of conviction, this Court stated it was convinced beyond a reasonable doubt that these hormone preparations constituted not merely a potential danger but also an actual danger to health when used indiscriminately by the lay person. This Court also stated that the therapeutic claims which said Allen H. Parkinson had made for these products far exceeded the benefits that could be derived from them.

(7) In less than a month after the aforesaid conviction, said Allen H. Parkinson, then doing business through the Hudson Products Company, a corporation, and its wholly owned subsidiary, Maywood Pharmacal Company, a fictitious name, again embarked upon a widespread mail-order promotion of drugs containing methyl testosterone. While the composition of said drugs was altered by the addition of Vitamin B1 and the labeling of said drugs was modified, said Allen H. Parkinson continued to make substantially the same sexual rejuvenation claims as were the basis for the criminal action.

(8) On September 29, 1949, the United States filed a Complaint for Injunction in this Court [Civil Action No. 10391-HW] alleging that the aforesaid activities described in Paragraph (7) above were in violation of the Act. Upon appellate review of that case which had been consolidated with another, *United States v. El-O-Pathic Pharmacy, et al.*, 192 F.(2d) 62 (C.A. 9, 1951), said Allen H. Parkinson was permanently restrained by this Court from continuing the aforesaid mail-order sex-hormone business which was based upon sexual rejuvenation claims. [4]

(9) On September 25, 1952, Wayne A. Parkinson registered with the Los Angeles County Clerk the fictitious business name of Dybutol Company. On November 14, 1952, said Wayne A. Parkinson registered with the Los Angeles County Clerk the fictitious business name of Glandular Products Company.

(10) Said Dybutol Company and Glandular Products Company then embarked upon a mail-order promotion of a drug designated both as Vita-Glan Male Formula, Regular Strength, and as Vita-Glan Male Formula, Double Strength, said drug being offered primarily for sexual rejuvenation. Vita-Glan Male Formula, Regular Strength, and Vita-Glan Male Formula, Double Strength, are identical drugs except that the Double Strength product is recommended in twice the daily dosage of the Regular Strength. Said drug consists of vitamins in an inert glandular base. There is now pending in

this Court a 6-Count Criminal Information against Wayne A. Parkinson [Cause No. 23165-Criminal] based upon the interstate shipment of said drugs during the period of November 28, 1952, and January 22, 1953.

(11) In the latter part of 1953, defendants herein commenced a nationwide mail-order promotion of a drug designated both as Bio-Glan Male Formula, Regular Strength, and as Bio-Glan Male Formula, Double Strength, alleging their efficacy in sexual rejuvenation. Bio-Glan Male Formula, Regular Strength, and Bio-Glan Male Formula, Double Strength, are identical drugs except that the Double Strength product is recommended in twice the daily dosage of the Regular Strength. The composition of said drug is essentially the same as the aforesaid Vita-Glan Male Formula, except that capsules of wheat germ oil are included in the package.

(12) In the latter part of January, 1954, defendants initiated yet another nationwide mail-order promotion of a drug designated both as Adler's Compound Standard Strength, and as Adler's Compound Super Strength. Adler's Compound Standard Strength and Adler's Compound Super Strength are identical drugs except that the Super Strength product is recommended in twice the daily dosage of the Standard Strength. Said drug, which is also offered for sexual rejuvenation, consists of vitamins, minerals, and wheat germ oil in an inert glandular base. In this current promotion, the tens of thousands of persons who [5] are on defendants' mail-

ing list receive letters whose envelopes are postmarked London, England, and give the return address of Konrad Adler & Company, Frankfurt am Main, Germany. Such letters offer the recipient "a new and amazing medical miracle for males," Adler's Compound, which, despite subtle qualification, is represented as a new and secret German formula effective for sexual rejuvenation. European Sales Offices are declared to be located at Paris, Rome, and London. Glandular Products Company of Long Beach, California, is stated to be the sole United States distributor of said drug. Enclosed with the letter is a 4-page descriptive folder, an order form, and an air-mail business reply envelope on which is imprinted the address of Glandular Products Company. The price range per order is from \$10 to \$35.

(13) All of the drugs distributed by the defendants, including Adler's Compound, are manufactured in the United States.

(14) When the defendants cause the drug, Adler's Compound, to be introduced or delivered for introduction into interstate commerce, the labeling thereof includes the following items which are appended as Exhibits to this Complaint and incorporated herein:

(a) Exhibit 1—mailing envelope with return address given as "Konrad Adler & Company, Frankfurt am Main, Germany;"

(b) Exhibit 2—undated letter bearing letterhead "Konrad Adler & Company" and purported facsimile signature of Konrad Adler;

(c) Exhibit 3—4-page descriptive folder regarding the drug, Adler's Compound;

(d) Exhibit 4—order form;

(e) Exhibit 5—air mail business reply envelope addressed to Glandular Products Company;

(f) Exhibit 6a—bottle label stating in part "Adler's Compound Standard Strength;"

Exhibit 6b—bottle label stating in part "Adler's Compound Super Strength."

(15) Defendants violate Section 301(a) of the Act [21 U.S.C. 331(a)] [6] by causing the introduction and delivery for introduction into interstate commerce of the drug, Adler's Compound, with labeling as described in paragraph (14) above, which is misbranded within the meaning of Section 502(a) of the Act [21 U.S.C. 352(a)] in that the labeling is false and misleading since it represents, suggests, and creates the impression in the mind of the prospective purchaser to whom it is directed

(a) that said drug is highly efficacious in overcoming male sexual weakness and impotence whereas it is not efficacious for such purposes;

(b) that said drug, which is distributed in the United States by Glandular Products Company, is manufactured in Germany and is available in the United States in limited supply only, whereas said drug is manufactured in Los Angeles, California, on

order of the defendants and is available here in unlimited supply;

(c) that said drug is a new and amazing medical miracle developed by outstanding German pharmaceutical knowledge and ingenuity, whereas said drug is composed of commonly known ingredients and is not a new and amazing medical miracle;

(d) that the tablets comprising Adler's Compound, Super Strength, differ in composition and potency from the tablets comprising Adler's Compound, Standard Strength, whereas all of the tablets are identical in composition and potency.

(e) that distribution of said drug is licensed by the person whose photograph appears on various items of the labeling and who is identified there as Konrad Adler, a German specialist in glandular research, whereas said photograph is in fact that of a professional model who resided in Hollywood, California, years ago, when said photograph was taken.

(16) When the defendants cause the drug, Bio-Glan Male Formula together with Bio-Glan Fortified Wheat Germ Oil, to be introduced or delivered for introduction into interstate commerce, the labeling thereof includes the following items which are appended as Exhibits to this Complaint and incorporated herein:

(a) Exhibit 7—letter from Glandular Products Company purporting [7] to be signed by "John Garwood;"

- (b) Exhibit 8—large testimonial folder;
- (c) Exhibit 9—letter from Glandular Products Company purporting to be signed by “John Garwood, Medical Director;”
- (d) Exhibit 10—small testimonial folder;
- (e) Exhibit 11—folder describing book “Modern Sex Life”;
- (f) Exhibit 12—order form;
- (g) Exhibit 13—letter from Glandular Products Company marked “Confidential” and purporting to be signed by “John Garwood”;
- (h) Exhibit 14—folder entitled “New Safe Bio-Glan Male Formula”;
- (i) Exhibit 15a—bottle label for Bio-Glan Male Formula, Regular Strength, and bottle label for Bio-Glan Fortified Wheat Germ Oil;
- (j) Exhibit 15b—bottle label for Bio-Glan Male Formula, Double Strength, and bottle label for Bio-Glan Fortified Wheat Germ Oil.

(17) Defendants violate Section 301(a) of the Act [21 U.S.C. 331(a)] by causing the introduction and delivery for introduction into interstate commerce of the drug, Bio-Glan Male Formula together with Bio-Glan Fortified Wheat Germ Oil, with labeling as described in paragraph (16) above, which is misbranded within the meaning of Section 502(a) of the Act [21 U.S.C. 352(a)] in that the labeling is false and misleading since it represents, suggests,

and creates the impression in the mind of the prospective purchaser to whom it is directed

(a) that said drug is highly efficacious in overcoming male sexual weakness and impotence whereas it is not efficacious for such purposes;

(b) that said drug is marketed by Glandular Products Company upon the advice and guidance of a Medical Director, John Garwood, whereas said Company has no Medical Director and the name "John Garwood" is a fictitious one adopted by Wayne A. Parkinson, who is not trained in the field of medicine;

(c) that the tablets comprising Bio-Glan Male Formula, Double Strength, have twice the potency of the tablets comprising Bio-Glan Male Formula, Regular Strength, whereas all of the tablets are identical in composition [8] and potency; and

(d) that the use of the Bio-Glan Male Formula, Double Strength, creates such a rapid sexual rejuvenation in males previously lacking in sexual power as to warrant the use of a double-strength anaesthetic ointment to retard the male sexual climax, whereas the use of said drug will not cause any sexual rejuvenation.

(18) When the defendants cause the drug, Vita-Glan Male Formula, to be introduced or delivered for introduction into interstate commerce, the labeling thereof includes the following items which are appended as Exhibits to this Complaint and incorporated herein:

(a) Exhibit 16—folder entitled “Amazing New Vita-Glan”;

(b) Exhibit 17—folder entitled “A Report to Physicians and the Public”;

(c) Exhibit 18—order form;

(d) Exhibit 19a—bottle label for Vita-Glan Male Formula, Regular Strength;

Exhibit 19b—bottle label for Vita-Glan Male Formula, Double Strength.

(19) Defendants violate Section 301(a) of the Act [21 U.S.C. 331(a)] by causing the introduction and delivery for introduction into interstate commerce of the drug, Vita-Glan Male Formula, with labeling as described in paragraph (18) above, which is misbranded within the meaning of Section 502(a) of the Act [21 U.S.C. 352(a)] in that the labeling is false and misleading since it represents, suggests, and creates the impression in the mind of the prospective purchaser to whom it is directed

(a) that said drug is highly efficacious in overcoming male sexual weakness and impotence whereas it is not efficacious for such purposes;

(b) that said drug is highly efficacious in overcoming nervousness, loss of muscle tone, vague aches and pains, fatigue, irritability, headaches, dizziness, weakness, mental depression, insomnia, digestive upsets, loss of appetite, neuritis, backache, and mental dullness, whereas it is not efficacious for such purposes. [9]

(c) that said drug is marketed by Glandular Products Company upon the advice and guidance of a Medical Director, whereas said Company has no Medical Director;

(d) That the tablets comprising Vita-Glan Male Formula, Double Strength, have twice the potency of the tablets comprising Vita-Glan Male Formula, Regular Strength, whereas all of the tablets are identical in composition and potency;

(e) that the use of the Vita-Glan Male Formula, Double Strength, creates such a rapid sexual rejuvenation in males previously lacking in sexual power as to warrant the use of an anaesthetic ointment to retard the male sexual climax, whereas the use of said drug will not cause any sexual rejuvenation.

(20) Plaintiff is informed and believes that if the defendants are forced by an injunction to discontinue their offensive labeling they will, unless further enjoined, continue the promotion and distribution of the aforesaid drugs and similar drugs by making claims for sexual rejuvenation through collateral media outside of labeling. In that case, the drugs would be misbranded within the meaning of 21 U.S.C. 352(f)(1) in that their labeling would fail to bear adequate directions for use.

(21) Plaintiff is informed and believes that, unless restrained by this Court, the defendants will continue to introduce and deliver for introduction into interstate commerce the aforesaid drugs and similar drugs and other drugs offered for similar

purposes which are misbranded within the meaning of 21 U.S.C. 352(a) or 352(f)(1).

Wherefore, plaintiff prays:

That the defendants and each of their agents, servants, employees, and attorneys, and all persons in active concert or participation with any of them, be perpetually enjoined from directly or indirectly causing to be introduced or delivered for introduction into interstate commerce, in violation of Section 301(a) of the Act [21 U.S.C. 331(a)] the drugs hereinbefore described or any similar drugs or any other drugs offered for similar purposes which are misbranded within the meaning of Sections 502(a) or 502(f)(1) of the Act [21 U.S.C. 352(a) or 352(f)(1)]; and [10]

That a Temporary Restraining Order be granted without notice to the defendants restraining the defendants as prayed hereinabove since, as shown by the attached affidavits, immediate and irreparable loss and damage will result to the plaintiff before notice can be served and a hearing had thereon; and

That at the earliest possible time during the effectiveness of the Temporary Restraining Order, an order be made and entered directing the defendants to show cause, at a time and place to be designated in such order, why they should not be restrained as herein prayed during the pendency of this action; and that upon the hearing of said order to show cause, a Preliminary Injunction be granted restrain-

ing the defendants as herein prayed during the pendency of this action; and

That the defendants be ordered to tender to all present and past purchasers of the drugs enumerated in paragraph (2) above, a refund of all amounts collected by said defendants from said purchasers; and

That the plaintiff be given judgment for its costs herein and for such other and further relief as to the Court may seem just and proper.

LAUGHLIN E. WATERS,
United States Attorney,

/s/ MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division.

Duly Verified.

[Endorsed]: Filed February 26, 1954. [11]

[Title of District Court and Cause.]

AFFIDAVITS IN SUPPORT OF PRAYER
FOR TEMPORARY RESTRAINING ORDER

Attached are the affidavits of:

1. Gordon R. Wood, Chief, Los Angeles District, Food and Drug Administration, Department of Health, Education, and Welfare.
2. Dr. Homer C. Lawson, M.D., Pharmacologist.
3. Dr. Carl E. Ebert, M.D., Urologist.

4. Dr. James Edward McGinnis, M.D., Psychiatrist.
5. Dick Whittington, Photographer.
6. Winifred Westrem.

LAUGHLIN E. WATERS,
United States Attorney,

/s/ MAX F. DEUTZ,
Assistant U. S. Attorney.

United States of America,
Southern District of California—ss.
State of California,
County of Los Angeles.

AFFIDAVIT OF GORDON R. WOOD

Gordon R. Wood, being first duly sworn, deposes and says that he is Chief, Los Angeles District, Food and Drug Administration, Department of Health, Education, and Welfare, and that the following facts, which are supplemental to those stated in the verified Complaint for Injunction filed in the above proceeding, appear from the official records of the Food and Drug Administration in his custody, and from official investigations and reports made under his direction by inspectors of the said Los Angeles District:

(1) With respect to the drug "Adler's Compound," wherein the sales promotional material was

mailed from London, England, over 150,000 of the mailing envelopes and over 150,000 of the airmail business reply envelopes were printed in Los Angeles, California. These envelopes are identified in the Complaint for Injunction as Exhibits 1 and 5.

(2) In preparing the German letterhead, the artwork, and the remaining layout for the form letter identified in the Complaint for Injunction as Exhibit 2, the Los Angeles firm, which printed the aforesaid envelopes, received from the defendants English language copy, material parts of which the printing firm then translated into the German language at the request of the defendants.

(3) In response to the mail-order solicitation described in paragraph (12) of the Complaint for Injunction, defendants have received hundreds of orders per week for Adler's Compound, each order, according to the order form, ranging in amount from \$10 to \$35.

(4) Defendants thus far have had a total of over 400,000 tablets of the drug they designate "Adler's Compound" manufactured for them in Los Angeles, California. Approximately 200,000 of these tablets were delivered to defendants by the manufacturer on February 19, 1954. Sixty tablets of this composition, which defendants sell for \$10 per bottle, can be purchased in wholesale [37] quantities for approximately 25 cents.

(5) Defendants are in the midst of distributing in interstate commerce a large quantity of Adler's

Compound and the other drugs enumerated in paragraph (2) of the Complaint for Injunction. Defendants are thereby now causing immediate and irreparable loss and damage to the public since, for the reasons stated in the medical affidavits which accompany this affidavit, said drugs are worthless for the purposes for which they are offered, and since large numbers of purchasers throughout the nation are being induced to order and pay for the drugs.

/s/ GORDON R. WOOD.

Subscribed and sworn to before me this 26th day of February, 1954.

[Seal] EDMUND L. SMITH,
Clerk, U. S. District Court, Southern District of
California.

By /s/ [Indistinguishable],
Deputy. [38]

United States of America,
Southern District of California—ss.
State of California,
County of Los Angeles.

AFFIDAVIT OF HOMER C. LAWSON, M.D.

Homer C. Lawson, M.D., having been first duly sworn, deposes and says:

(1) I am a Doctor of Medicine having received that degree from the University of Nebraska Medical School in 1928.

(2) I engaged in the general practice of medicine for twelve years following receipt of the degree of Doctor of Medicine.

(3) Since 1941 I have specialized in the study of Pharmacology.

(4) Pharmacology is the study of the action of drugs and related substances in man and other animals.

(5) I have been affiliated with the Department of Pharmacology of the University of Southern California Medical School since 1941.

(6) I am now, and have for some time been, a professor of Pharmacology in the Department of Pharmacology at the University of Southern California Medical School.

(7) I have been shown a statement of composition, labels, and labeling of the preparations designated as "Adler's Compound," "Bio-Glan Male Formula," "Bio-Glan Fortified Wheat Germ Oil," and "Vita-Glan Male Formula" distributed by Glandular Products Company, Long Beach, California.

(8) "Adler's Compound" appears to be offered as a treatment for male sexual weakness and impotence.

(9) The preparation "Adler's Compound" consists of several inert glandular ingredients which have no physiological activity and very small quantities of minerals and vitamins, together with a very small amount of caffeine.

(10) The preparation "Adler's Compound" has no value whatever in the treatment of male sexual weakness or impotence.

(11) The psychosomatic treatment of male sexual weakness of psychogenic origin cannot be effected by the administration of any drug because the treatment [39] of impotence or male sexual weakness of psychogenic origin involves a search for underlying psychiatric factors and their correction by recognized psychotherapeutic procedures.

(12) The preparation "Bio-Glan Male Formula" also is offered for the treatment of male sexual weakness and impotence. This preparation consists of a mixture of three B vitamins (Vitamin B₁, Vitamin B₂ and Niacinamide) in an inert glandular base which would have no therapeutic value.

(13) There is no medical basis for supposing that male sexual weakness or impotence of psychosomatic origin is due to a deficiency of the B vitamins contained in "Bio-Glan Male Formula."

(14) The administration of a preparation of the composition of "Bio-Glan Male Formula" in either "regular strength" with fortified wheat germ oil, or "double strength" with fortified wheat germ oil would be of no value in the treatment of male sexual weakness or impotence, for the reasons stated in paragraph (11) above.

(15) The preparation "Vita-Glan Male Formula" is of the same composition as "Bio-Glan Male Formula."

(16) "Vita-Glan Male Formula" is offered for male sexual weakness and impotence.

(17) The preparation "Vita-Glan Male Formula" would be of no value in the treatment of male sexual weakness or impotence for the reasons stated in paragraph (11) above.

(18) Distribution of the drugs, "Vita-Glan Male Formula," "Bio-Glan Male Formula," and "Adler's Compound" as a treatment for male sexual weakness or impotence constitutes a deception of the purchaser, since none of these articles is of any value in the treatment of such conditions.

(19) It is the consensus of well-informed physicians and pharmacologists [40] that there is no drug or combination of drugs which constitutes adequate treatment for male sexual weakness or impotence.

/s/ HOMER C. LAWSON.

Subscribed and sworn to before me this 24th day of February, 1954.

/s/ RALPH W. WEILLERSTEIN,

Employee of the Department of Health, Education, and Welfare, designated under the Act of January 31, 1925, and Reorganization Plan IV effective June 30, 1940, and Reorganization Plan No. 1 of 1953, Secs. 1-9, effective April 11, 1953, to administer or take oaths, affirmations, and affidavits. [41]

United States of America,
Southern District of California—ss.
State of California,
County of Los Angeles.

AFFIDAVIT OF CARL E. EBERT, M.D.

Carl E. Ebert, M.D., having been first duly sworn,
deposes and says:

(1) I am a licensed physician in the State of California with a degree of Doctor of Medicine.

(2) I have done postgraduate work in Urology.

(3) I have specialized in the practice of Urology, and I am a Diplomate of the American Board of Urology. I have offices at 1893 Wilshire Boulevard, Los Angeles, California.

(4) Urology is that branch of medicine that deals with the male urinary and genital system and the female urinary system.

(5) I have been shown a statement of composition, the labels, and the labeling of the drugs, "Adler's Compound," "Bio-Glan Male Formula" and "Bio-Glan Fortified Wheat Germ Oil," and "Vita-Glan Male Formula."

(6) It appears that these articles are all offered for the treatment of male sexual weakness and impotence.

(7) Male sexual weakness and impotence may be due to many factors, most of which are not capable of being recognized by the person who suffers from

them. Some of these factors may be the result of serious physical disorders, while others may be due to psychological factors.

(8) The treatment of impotence and male sexual weakness due to physical disorders consists of determining the cause and correcting it.

(9) The treatment of impotence and male sexual weakness due to psychological factors consists of determining what the psychological cause is and correcting it.

(10) The administration of preparations such as these which contain small quantities of B vitamins, inert glandular extracts with or without the addition of minerals or wheat germ oil, does not constitute a proper treatment [42] of any form of male sexual weakness or impotence.

(11) The promotion of articles such as "Adler's Compound," "Bio-Glan Male Formula," together with "Bio-Glan Fortified Wheat Germ Oil," and "Vita-Glan Male Formula" plays on the desire of persons suffering from a variety of conditions ranging from boredom to severe psychiatric and physical illness for a magical cure of their underlying disorders.

(12) Distribution of these drugs for this purpose constitutes a deception upon the prospective purchaser, since they neither uncover the cause nor treat, in any proper manner, the conditions for which they are offered.

(13) It is the consensus of well informed physicians that there is no drug or combination of drugs which constitutes an adequate treatment for male sexual weakness or impotence.

/s/ CARL E. EBERT, M.D.

Subscribed and sworn to before me this 24th day of February, 1954.

/s/ RALPH W. WEILERSTEIN,
Employee of the Department of Health, Education,
and Welfare, designated under the Act of January 31, 1925, and Reorganization Plan IV effective June 30, 1940, and Reorganization Plan No. I of 1953, Secs. 1-9, effective April 11, 1953, to administer or take oaths, affirmations, and affidavits. [43]

United States of America,
Southern District of California—ss.
State of California,
County of Los Angeles.

AFFIDAVIT OF
JAMES EDWARD MCGINNIS, M.D.

James Edward McGinnis, having been first duly sworn, deposes and says:

(1) I am a licensed physician in the State of California with a degree of Doctor of Medicine from Stanford University, in 1938.

(2) I did graduate work in psychiatry and neurology at Stanford Hospital and Los Angeles County General Hospital.

(3) I have specialized in the practice of psychiatry and neurology since 1938.

(4) I have been consulting psychiatrist for the California Vocational Institution and a medical examiner for the Superior Court of the State of California.

(5) Psychiatry is that branch of medicine that deals with disorders affecting the personality and interpersonal relationships.

(6) I am Assistant Clinical Professor of Psychiatry at the University of Southern California Medical School.

(7) I am a member of the American Medical Association and a Fellow of the American Psychiatric Association.

(8) I am Chief Psychiatrist Training at the Los Angeles County General Hospital.

(9) I have maintain offices for the private practice of psychiatry at 727 West Seventh Street, Los Angeles.

(10) I have been shown the formula and statement of composition for the preparations designated as Adler's Compound, Bio-Glan Male Formula and Bio-Glan Fortified Wheat Germ Oil, and Vita-Glan Male Formula distributed by Glandular Products Company, Long Beach, California.

(11) I have been shown the labels and labeling for the preparations mentioned in Paragraph (10) above and understand that these preparations are

offered for their psychosomatic value in male sexual weakness of a psychogenic origin. [44]

(12) Male sexual weakness or impotence of psychogenic origin may be due to poor interpersonal relationships, or mental disorders of various types including psychoneuroses and psychoses.

(13) The differential diagnosis of the type of personality disorder, psychological maladjustment, psychoneurosis, or psychosis responsible for male sexual weakness or impotence requires the study of the patient by a physician especially trained in understanding the diagnosis and treatment of such conditions.

(14) The proper and successful treatment of such conditions depends on the proper management of the patient, which includes a careful diagnostic approach and therapy designed to eliminate or reduce the intensity of the causative factors. This therapy is usually psychological or psychiatric in character and does not involve the use of drugs such as are present in the preparations listed in paragraph (10) above.

(15) The use of such preparations as are listed in paragraph (10) above in psychosomatic therapy is based on a misconception of the proper diagnosis or treatment of psychosomatic disorders.

(16) The value of such preparations as are listed in paragraph (10) above for the treatment of male sexual weakness consists primarily of the suggestion to the patient that the article will be of benefit. Such

suggestive therapy is at best only of transient duration, primarily in suggestible individuals.

(17) The promotion and sale of such preparations as are listed in Paragraph (10) above does not constitute psychosomatic therapy, does not possess psychosomatic value, and does not provide any real therapeutic value for male sexual weakness or impotence of psychogenic origin, nor does it constitute proper therapy for any type of male sexual weakness or impotence with which I am acquainted.

(18) It is the consensus of informed experts in the field of psychiatry that the promotion and sale of drugs such as Vita-Glan Male Formula, Bio-Glan Male Formula and Bio-Glan Fortified Wheat Germ Oil, and Adler's Compound are of no psychosomatic value, have no place in [45] psychotherapy, and are definitely not indicated in the treatment of male sexual weakness of psychogenic origin or in any condition stemming therefrom.

/s/ JAMES E. MCGINNIS, M.D.

Subscribed and sworn to before me this 24th day of February, 1954.

/s/ RALPH W. WEILERSTEIN,
Employee of the Department of Health, Education,
and Welfare, designated under the Act of January 31, 1925, and Reorganization Plan IV effective June 30, 1940, and Reorganization Plan No. I of 1953, Secs. 1-9, effective April 11, 1953, to administer or take oaths, affirmations, and affidavits. [46]

AFFIDAVIT

Sample No. Inv. 86-694L

State of California,
County of Los Angeles.

Before me, Frank McKinlay, an employee of the Department of Health, Education, and Welfare, Food and Drug Administration, designated by the Secretary, under authority of the Act of January 31, 1925, 43 Statutes at Large 803, (5 U.S.C. 521); Reorganization No. IV, Secs. 12-15, effective June 30, 1940; and Reorganization Plan No. 1, of 1953, Secs. 1-9, effective April 11, 1953, to administer or take oaths, affirmations, and affidavits, personally appeared Dick Whittington in the county and State aforesaid, who, being first duly sworn, deposes and says:

That 8-inch by 10-inch photograph, of James Carlisle of 2180 North Highland Avenue, Los Angeles, California, was obtained by Inspector Frank McKinlay of the United States Food and Drug Administration on February 24th, 1954, for official Government use;

That the aforesaid photograph is a "Photo by 'Dick' Whittington," posed by a professional model (James Carlisle), and our records show that our firm took it during February, 1941;

That another such print from this same negative was sold under our license, on or about December

9, 1953, to Kellaway Ida Company, 1118 East 8th St., Los Angeles, California.

That Inspector Frank McKinlay paid us the sum of \$10.00 in payment for the copy, 8-inch by 10-inch print, which he obtained from us;

That Inspector Frank McKinlay compared the aforesaid print with 5"x7" negative, in our file, of the photograph.

Print identified as our

File: H126

No. D2-57-3.

Firm:

DICK WHITTINGTON
PHOTOS,

Per:

/s/ DICK WHITTINGTON,
(Title) Prop.

Subscribed and sworn to before me at Los Angeles, California, this 24th day of February, 1954.

/s/ FRANK McKINLAY,

Employee of the Department of Health, Education, and Welfare designated under Act of January 31, 1925, Reorganization Plan IV effective June 30, 1940; and Reorganization Plan No. 1 of 1953, effective April 11, 1953. [47]





Photo by Dick Whittington

AFFIDAVIT

Sample No. Inv. 86-694L.

State of California,
County of Los Angeles.

Before me, Frank McKinlay, an employee of the Department of Health, Education, and Welfare, Food and Drug Administration, designated by the Secretary, under authority of the Act of January 31, 1925, 43 Statutes at Large 803, (5 U.S.C. 521); Reorganization No. IV, Secs. 12-15, effective June 30, 1940; and Reorganization Plan No. 1, of 1953, Secs. 1-9, effective April 11, 1953, to administer or take oaths, affirmations, and affidavits, personally appeared Winifred Westrem in the county and State aforesaid, who, being first duly sworn, deposes and says:

That James Carlisle, whose photograph Inspector Frank McKinlay showed me today, lived as my tenant for four years at 1937 North Highland Avenue, Los Angeles, California (Hollywood District) and passed away on February 3, 1954; that to my knowledge he never used the name Konrad Adler.

Affiant:

/s/ WINIFRED WESTREM,

Address:

1935 N. Highland Avenue,
Los Angeles 28, California.

Subscribed and sworn to before me at Los Angeles, California, this 24th day of February, 1954.

/s/ FRANK McKINLAY,
Employee of the Department of Health, Education,
and Welfare designated under Act of January
31, 1925, Reorganization Plan IV effective June
30, 1940; and Reorganization Plan No. 1 of
1953, effective April 11, 1953.

[Endorsed]: Filed February 26, 1954. [49]

[Title of District Court and Cause.]

TEMPORARY RESTRAINING ORDER

Plaintiff having filed a verified Complaint for Injunction praying for a temporary restraining order without notice, for a preliminary injunction, and for a permanent injunction; and plaintiff having filed affidavits in support of the prayer for a temporary restraining order without notice; and the Court having considered the Complaint and supporting affidavits; and it appearing that defendants are violating and will continue to violate Section 301(a) of the Federal Food, Drug and Cosmetic Act [21 U.S.C. 331(a)] unless restrained by order of this Court; and it appearing that the defendants are causing immediate and irreparable loss and damage to the public through their nationwide present and threatened distribution of drugs, misbranded within the meaning of 21 U.S.C. 352(a) or (f)(1), such as

Adler's Compound Standard Strength, [50]

Adler's Compound Super Strength,

Vita-Glan Male Formula, Regular Strength,

Vita-Glan Male Formula, Double Strength,

Bio-Glan Male Formula, Regular Strength,
together with Bio-Glan Fortified Wheat
Germ Oil,

Bio-Glan Male Formula, Double Strength,
together with Bio-Glan Fortified Wheat
Germ Oil,

or other similar drugs, or other drugs offered for similar purposes—namely, for overcoming male sexual weakness and impotence; and it appearing that such drugs are without efficacy for such purposes; and it appearing that a substantial segment of the public in various parts of the United States is being induced to order and pay for such drugs upon defendants' unwarranted representations; and it appearing that the giving of notice to the defendants would unduly delay protecting the public from financial loss and damage caused by defendants' interstate distribution of such misbranded drugs;

It Is Therefore Ordered that the plaintiff's prayer for a temporary restraining order without notice be and it is hereby granted, and that the defendants Wayne A. Parkinson, Allen H. Parkinson, and Margaret M. Willis, and their agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, be and they are hereby temporarily enjoined and restrained from directly or indirectly causing the in-

troducton or delivery for introduction into interstate commerce, of any of the above-enumerated drugs or any other drugs which are misbranded in violation of 21 U.S.C. 352(a) or (f) (1) in that:

(1) the labeling of any such drug represents, suggests or creates the impression in the mind of the prospective purchaser to whom it is directed that such drug is efficacious in overcoming male sexual weakness or impotence; or

(2) the labeling of any such drug fails to bear adequate directions for use by failing to state all of the diseases and conditions of the body for which the drug is intended. [51]

Unless otherwise ordered by this Court, this Order shall expire at 9:15 a.m., March 8, 1954.

Dated: February 26, 1954, at 9:15 a.m.

/s/ BEN HARRISON,

United States District Judge.

[Endorsed]: Filed February 26, 1954. [52]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the Complaint for Injunction and affidavits annexed hereto, and in view of the issuance of a Temporary Restraining Order by this Court on this date, it is this 26th day of February, 1954, by the United States District Court for the Southern District of California, Central Division,

Ordered that the defendants Wayne A. Parkinson, Allen H. Parkinson, and Margaret M. Willis, show cause before this Court in Department 3 at 9:30 a.m., on the 5th day of March, 1954, or as soon thereafter as counsel can be heard, why a preliminary injunction should not issue in this cause as prayed for in said Complaint, provided that copies of this Order and of the said Complaint and affidavits be served on said defendants forthwith but not later than on the 1st day of March, 1954.

/s/ BEN HARRISON,

United States District Judge.

[Endorsed]: Filed February 26, 1954. [53]

[Title of District Court and Cause.]

AFFIDAVIT OF DR. EDWIN W. HIRSCH IN
SUPPORT OF PRELIMINARY INJUNCTION

United States of America,
Southern District of California—ss.
State of Illinois,
County of Cook.

AFFIDAVIT OF EDWIN W. HIRSCH, M.D.

Edwin W. Hirsch, M.D., having been first duly sworn, deposes and says:

(1) I am a licensed physician in the State of Illinois with a degree of Doctor of Medicine from Rush Medical College, Chicago, Illinois, in 1916.

(2) I am a member of the Chicago Medical Society, Illinois State Medical Association, and a Fellow of the American Medical Association.

(3) I am a member of the American Urological Association.

(4) I specialize in the practice of Urology and have offices at 185 North Wabash, Chicago, Illinois.

(5) Urology is that branch of medicine which deals with the diagnosis, treatment, and prevention of diseases in the urinary system and genital system of both males and females.

(6) I have been shown a statement of composition, the labels and the labeling of the drugs "Adler's Compound," "Bio-Glan Male Formula," "Bio-Glan Fortified Wheat Germ Oil," and "Vita-Glan Formula."

(7) I am the author of the book "Modern Sex Life" published by Permabooks, a division of Doubleday and Company, Inc., Garden City, New York, which is pictured in Exhibits 8 and 11 of the Complaint.

(8) The picture purporting to be a photograph of me adjacent to the statement "Dr. Edwin W. Hirsch . . . noted medical doctor, says:", appearing in Exhibits 8 and 10 of the Complaint is not a picture of me.

(9) The photograph attached herewith as Exhibit A is an authentic photograph of me taken in my office, Suite 1314, 185 North Wabash, Chicago,

Illinois, on March 2, 1954, and which I have signed [55] with my name for identification on March 3, 1954.

(10) The statements appearing in said Exhibits 8 and 10, taken out of context of my book "Modern Sex Life," are being used without my knowledge or consent. The unauthorized use of these statements was first brought to my attention on March 2, 1954.

(11) It appears that these articles named in paragraph (6) above are all offered for the treatment of male sexual weakness and impotence.

(12) Male sexual weakness and impotence may be due to many factors, many of which are not capable of being recognized by persons suffering from them. Some of these factors may be the result of serious physical disorders while others may be due to psychological factors such as poor interpersonal relationships, or mental disorders of various types including psychoneuroses and psychoses.

(13) The differential diagnosis of any type of personality disorder, psychological maladjustment, psychoneurosis, or psychosis responsible for male sexual weakness or impotence requires a study of the patient by a physician especially trained in understanding the diagnosis and treatment of such conditions.

(14) The proper and successful treatment of such conditions depends on the proper management of the patient which includes a careful diagnostic approach and therapy designed to eliminate or reduce the intensity of the causative factors.

(15) The administration of preparations such as those listed in paragraph (6) above does not constitute a proper treatment of any form of male sexual weakness or impotence.

(16) The promotion and sale of such preparations as those listed in paragraph (6) above plays on the desire of persons suffering from a variety of conditions and does not constitute proper therapy for any type of male sex weakness or impotence.

(17) Distribution of such drugs for this purpose [56] constitutes a deception upon the prospective purchaser since they neither uncover the cause nor treat in any proper manner the conditions for which they are offered.

(18) It is the consensus of well-informed physicians that there is no drug nor combination of drugs which constitutes adequate treatment for male sexual weakness or impotence.

/s/ EDWIN W. HIRSCH, M.D.

Subscribed and sworn to before me this 3rd day of March, 1954.

/s/ NORMAN DE NOSAQUO,
Employee of the Department of Health, Education,
and Welfare, designated under the Act of January 31, 1925, and Reorganization Plan IV effective June 30, 1940, and Reorganization Plan No. I of 1953, Secs. 1-9, effective April 11, 1953, to administer or take oaths, affirmations, and affidavits. [57]



Endorsed: Filed March 5, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TEMPORARY
RESTRAINING ORDER

The above entitled matter having come on for hearing this date on an Order to Show Cause why a preliminary injunction should not issue in this cause as prayed for in the Complaint filed herein; and the Court having considered the affidavits and argument offered on behalf of the plaintiff and the defendants; and the Court having ruled that a preliminary injunction should issue after compliance with Local Rule 7(a); and it appearing that the Temporary Restraining Order heretofore issued by this Court in this proceeding will expire on March 8, 1954, at 9:15 a.m., unless extended, and that it is not feasible for this Court to file preliminary findings of fact, preliminary conclusions of law, and a preliminary injunction in accordance with Local Rule 7(a) prior to the expiration date of said Temporary Restraining Order; and for good cause shown as hereinabove specified; [59]

It Is Hereby Ordered that the Temporary Restraining Order heretofore issued by this Court in this proceeding be and it is extended to remain effective unless otherwise ordered by this Court, until 9:15 a.m., March 18, 1954.

Dated: March 5, 1954.

/s/ JAMES M. CARTER,

United States District Judge.

[Endorsed]: Filed March 5, 1954. [60]

[Title of District Court and Cause.]

PRELIMINARY FINDINGS OF FACT AND CONCLUSIONS OF LAW

Preliminary Findings of Fact

(1) Defendant Wayne A. Parkinson trades and does business as Glandular Products Company and Dybutol Company at 1065 and 1067 East Anaheim Street, Long Beach, California.

(2) Defendant Allen H. Parkinson trades and does business as Tide Mailing Service at 1065 and 1067 East Anaheim Street, Long Beach, California. Defendant Margaret M. Willis is the operating manager of said Tide Mailing Service at the afore-said addresses.

(3) Said defendants are the interstate promoters and distributors of articles designated by name as: [61]

(a) Adler's Compound Standard Strength;

(b) Adler's Compound Super Strength;

(c) Vita-Glan Male Formula, Regular Strength;

(d) Vita-Glan Male Formula, Double Strength;

(e) Bio-Glan Male Formula, Regular Strength, together with Bio-Glan Fortified Wheat Germ Oil, and

(f) Bio-Glan Male Formula, Double Strength, together with Bio-Glan Fortified Wheat Germ Oil.

Each of said articles is a drug within the meaning of 21 U.S.C. 321(g) since it is intended for use in the treatment, mitigation, and cure of disease.

(4) The promotion and distribution of said drugs are carried out as a mail-order business conducted in the name of Glandular Products Company and Dybutol Company. These two companies have no employees.

(5) Substantially all of the normal business functions of said companies—including the printing, addressing, and mailing of labeling of the afore-said drugs; the maintenance of extensive mailing lists which defendants have compiled or purchased over a period of years and which include the names and addresses of individuals who have responded in the past to magazine and newspaper advertisements promoting drugs and devices for sexual rejuvenation; the receipt and processing of mail orders for said drugs; the bottling, packaging, and labeling of said drugs; the addressing and shipping of said drugs in response to said mail orders; the maintenance of business records—are performed or arranged for by the Tide Mailing Service.

(6) In the latter part of 1952, said defendants commenced a nationwide mail-order promotion of a drug designated both as Vita-Glan Male Formula, Regular Strength, and Vita-Glan Male Formula,

Double Strength, said drug being offered primarily for sexual rejuvenation. Vita-Glan Male Formula, Regular Strength, and Vita-Glan Male Formula, Double Strength, are identical drugs except that the Double Strength product is recommended in twice the daily dosage of the Regular Strength. Said drug consists of vitamins in an inert glandular base.

(7) In the latter part of 1953, said defendants commenced a [62] nationwide mail-order promotion of a drug designated both as Bio-Glan Male Formula, Regular Strength, and as Bio-Glan Male Formula, Double Strength, alleging its efficacy in sexual rejuvenation. Bio-Glan Male Formula, Regular Strength, and Bio-Glan Male Formula, Double Strength, are identical drugs except that the Double Strength product is recommended in twice the daily dosage of the Regular Strength. The composition of said drug is essentially the same as the aforesaid Vita-Glan Male Formula, except that capsules of wheat germ oil are included in the package.

(8) In the latter part of January, 1954, said defendants initiated a nationwide mail-order promotion of a drug designated both as Adler's Compound Standard Strength, and as Adler's Compound Super Strength. Adler's Compound Standard Strength and Adler's Compound Super Strength are identical drugs except that the Super Strength product is recommended in twice the daily dosage of the Standard Strength. Said drug, which is also offered for sexual rejuvenation, consists of vitamins, minerals, and wheat germ oil in an inert glandular

base. In this current promotion, tens of thousands of persons who are on defendants' mailing list receive letters whose envelopes are postmarked London, England, and give the return address of Konrad Adler & Company, Frankfurt am Main, Germany. Such letters offer the recipient "a new and amazing medical miracle for males," Adler's Compound, which, despite subtle qualification, is represented as a new and secret German formula effective for sexual rejuvenation. European Sales Offices are declared to be located at Paris, Rome and London. Glandular Products Company of Long Beach, California, is stated to be the sole United States distributor of said drug. Enclosed with the letter is a 4-page descriptive folder, an order form, and an air-mail business reply envelope on which is imprinted the address of Glandular Products Company. The price range per order is from \$10 to \$35.

(9) All of the drugs distributed by the defendants, including Adler's Compound, are manufactured in the United States.

(10) When the defendants cause the drug, Adler's Compound, to be introduced or delivered for introduction into interstate commerce, the labeling thereof includes the following items which are appended as Exhibits to the [63] Complaint for Injunction:

(a) Exhibit 1—mailing envelope with return address given as "Konrad Adler & Company, Frankfurt am Main, Germany";

(b) Exhibit 2—undated letter bearing letterhead “Konrad Adler & Company” and purported facsimile signature of Konrad Adler;

(c) Exhibit 3—4-page descriptive folder regarding the drug, Adler’s Compound;

(d) Exhibit 4—order form;

(e) Exhibit 5—airmail business reply envelope addressed to Glandular Products Company;

(f) Exhibit 6a—bottle label stating in part “Adler’s Compound Standard Strength”;

Exhibit 6b—bottle label stating in part “Adler’s Compound Super Strength.”

(11) The labeling of Adler’s Compound creates the impression in the mind of the prospective purchaser to whom it is directed

(a) that said drug is highly efficacious in overcoming male sexual weakness and impotence;

(b) that said drug is manufactured in Germany and is available in the United States in limited supply only;

(c) that said drug is a new and amazing medical miracle developed by outstanding German pharmaceutical knowledge and ingenuity;

(d) that the tablets comprising Adler’s Compound, Super Strength, differ in composition and potency from the tablets comprising Adler’s Compound, Standard Strength; and

(e) that distribution of said drug is licensed by the person whose photograph appears on various items of the labeling and who is identified there as Konrad Adler, a German specialist in glandular research.

(12) The drug, Adler's Compound, is not efficacious in overcoming male sexual weakness or impotence.

(13) Defendants have had a total of over 400,000 tablets of the [64] drug they designate "Adler's Compound" manufactured for them in Los Angeles, California. Approximately 200,000 of these tablets were delivered to defendants by the manufacturer on February 19, 1954. Sixty tablets of this composition, which defendants sell for \$10 per bottle, can be purchased in wholesale quantities for approximately 25 cents. These tablets are available in unlimited supply in the United States.

(14) Adler's Compound is composed of commonly know ingredients and is not a new or amazing medical miracle.

(15) The tablets comprising Adler's Compound Super Strength are identical in composition and potency with the tablets comprising Adler's Compound Standard Strength.

(16) The photograph purporting to be that of Konrad Adler in the labeling of Adler's Compound is in fact that of James Carlisle, a professional model who resided in Hollywood, California, in 1941

when the photograph was taken. Said James Carlisle died on February 3, 1954.

(17) When the defendants cause the drug, Bio-Glan Male Formula together with Bio-Glan Fortified Wheat Germ Oil, to be introduced or delivered for introduction into interstate commerce, the labeling thereof includes the following items which are appended as Exhibits to the Complaint for Injunction:

(a) Exhibit 7—letter from Glandular Products Company purporting to be signed by “John Garwood”;

(b) Exhibit 8—large testimonial folder;

(c) Exhibit 9—letter from Glandular Products Company purporting to be signed by “John Garwood, Medical Director”;

(d) Exhibit-10—small testimonial folder;

(e) Exhibit 11—folder describing book “Modern Sex Life”;

(f) Exhibit 12—order form;

(g) Exhibit 13—letter from Glandular Products Company marked “Confidential” and purporting to be signed by “John Garwood”;

(h) Exhibit 14—folder entitled “New Safe Bio-Glan Male Formula”;

(i) Exhibit 15a—bottle label for Bio-Glan Male Formula, Regular Strength, and bottle label for Bio-Glan Fortified [65] Wheat Germ Oil;

(j) Exhibit 15b—bottle label for Bio-Glan Male Formula, Double Strength, and bottle label for Bio-Glan Fortified Wheat Germ Oil.

(18) The labeling of Bio-Glan Male Formula together with Bio-Glan Fortified Wheat Germ Oil creates the impression in the mind of the prospective purchaser to whom it is directed

(a) that said drug is highly efficacious in overcoming male sexual weakness and impotence;

(b) that said drug is marketed by Glandular Products Company upon the advice and guidance of a Medical Director, John Garwood;

(c) that the tablets comprising Bio-Glan Male Formula, Double Strength, have twice the potency of the tablets comprising Bio-Glan Male Formula, Regular Strength; and

(d) that the use of the Bio-Glan Male Formula, Double Strength, creates such a rapid sexual rejuvenation in males previously lacking in sexual power as to warrant the use of double-strength anaesthetic ointment to retard the male sexual climax.

(19) The drug, Bio-Glan Male Formula together with Bio-Glan Fortified Wheat Germ Oil, is not efficacious in overcoming male sexual weakness or impotence.

(20) Glandular Products Company has no Medical Director, and the name "John Garwood" is a fictitious one adopted by defendant Wayne A. Parkinson who is not trained in the field of medicine.

(21) The tablets comprising Bio-Glan Male Formula, Double Strength, are identical in composition and potency with the tablets comprising Bio-Glan Male Formula, Regular Strength.

(22) The use of Bio-Glan Male Formula will not cause sexual rejuvenation.

(23) When the defendants cause the drug, Vita-Glan Male Formula, to be introduced or delivered for introduction into interstate commerce, the labeling thereof includes the following items which are appended as Exhibits to the [66] Complaint for Injunction:

(a) Exhibit 16—folder entitled “Amazing New Vita-Glan”;

(b) Exhibit 17—folder entitled “A Report to Physicians and the Public”;

(c) Exhibit 18—order form;

(d) Exhibit 19a—bottle label for Vita-Glan Male Formula, Regular Strength;

Exhibit 19b—bottle label for Vita-Glan Male Formula, Double Strength.

(24) The labeling of Vita-Glan Male Formula creates the impression in the mind of the prospective purchaser to whom it is directed

(a) that said drug is highly efficacious in overcoming male sexual weakness and impotence;

(b) that said drug is highly efficacious in overcoming nervousness, loss of muscle tone, vague aches

and pains, fatigue, irritability, headaches, dizziness, weakness, mental depression, insomnia, digestive upsets, loss of appetite, neuritis, backache, and mental dullness;

(c) that said drug is marketed by Glandular Products Company upon the advice and guidance of a Medical Director;

(d) that the tablets comprising Vita-Glan Male Formula, Double Strength, have twice the potency of the tablets comprising Vita-Glan Male Formula, Regular Strength; and

(e) that the use of Vita-Glan Male Formula, Double Strength, creates such a rapid sexual rejuvenation in males previously lacking in sexual power as to warrant the use of an anaesthetic ointment to retard the male sexual climax.

(25) The drug, Vita-Glan Male Formula, is not efficacious in overcoming male sexual weakness or impotence.

(26) The drug, Vita-Glan Male Formula, is not efficacious in overcoming any of the conditions specified in paragraph (24) (b) above.

(27) Glandular Products Company has no Medical Director.

(28) The tablets comprising Vita-Glan Male Formula, Double Strength, [67] are identical in composition and potency with the tablets comprising Vita-Glan Male Formula, Regular Strength.

(29) The use of Vita-Glan Male Formula will not cause sexual rejuvenation.

(30) The labeling of each of the aforesaid drugs creates false and misleading impressions as particularized above, within the meaning of 21 U.S.C. 352(a).

(31) Unless restrained by this Court, defendants intend to continue to introduce and deliver for introduction into interstate commerce, with similar false and misleading labeling representations, the aforesaid drugs and similar drugs and other drugs offered for similar purposes.

(32) An injunction which merely restrains the defendants from making false and misleading representations and suggestions in the labeling of the drugs they ship interstate could be circumvented readily by defendants' making representations and suggestions solely in collateral advertising media outside of the labeling, unless defendants are also restrained from using labeling which fails to bear "adequate directions for use," within the meaning of 21 U.S.C. 352(f)(1), by reason of its failure to state all of the purposes and conditions for which the drugs are intended.

(33) Defendants' interstate distribution of the aforesaid drugs is causing large numbers of gullible and credulous persons throughout the country to be deprived of substantial sums of money without receiving anything worthwhile in return, and is therefore causing irreparable loss and damage.

(34) Upon application of the plaintiff, this Court, on February 25, 1954, issued a Temporary

Restraining Order without notice to restrain defendants for 10 days from the interstate shipment of any of said drugs with labeling which creates the impression that such drug is efficacious in overcoming male sexual weakness or impotence, or with labeling which fails to bear adequate directions for use by failing to state all of the diseases and conditions of the body for which it is intended. On March 5, 1954, after hearing the parties on the prayer for a preliminary injunction, this Court issued an Order extending the effectiveness of said Temporary Restraining Order for an additional 10-day period. [68]

(35) The photograph which appears in Exhibits 8, 10, and 14 attached to the Complaint and which purports to be that of Dr. Edwin W. Hirsch, M.D., is not that of said Dr. Hirsch.

(36) The quotations from the book "Modern Sex Life" by said Dr. Hirsch, which appear in Exhibits 8 and 10 attached to the Complaint, are taken out of context, and were used by defendants without the knowledge or consent of Dr. Hirsch. [69]

Preliminary Conclusions of Law

(1) This Court has jurisdiction over the parties and subject matter of this proceeding under 21 U.S.C. 332(a), and is authorized by that provision to restrain violations of 21 U.S.C. 331(a).

(2) Defendants are violating 21 U.S.C. 331(a) by causing misbranded drugs to be introduced and delivered for introduction into interstate commerce.

(3) Said drugs herein involved are misbranded within the meaning of 21 U.S.C. 352(a) in that their labeling is false and misleading in many particulars.

(4) A drug is misbranded within the meaning of 21 U.S.C. 352(f)(1) where its labeling fails to bear "adequate directions for use" by omitting to state the purposes and conditions for which the drug is intended.

(5) Where the Court finds preliminarily that the defendants' interstate distribution of drugs is in violation of law and is causing irreparable loss and damage to large numbers of persons throughout the nation whose interest is represented by the plaintiff, and where the Court is satisfied that the plaintiff will probably establish its case when there is a final determination upon the merits, the Court should issue a preliminary injunction to maintain the status quo.

(6) Plaintiff is entitled to a preliminary injunction restraining the defendants from the interstate shipment of said misbranded drugs during the pendency of this litigation and until the final determination thereof.

Dated: March 11, 1954.

/s/ JAMES M. CARTER,
United States District Judge.

Receipt of Copy acknowledged.

Lodged March 10, 1954.

[Endorsed]: Filed March 11, 1954. [71]

In the United States District Court for the
Southern District of California, Central Division
No. 16415-C

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WAYNE A. PARKINSON, an Individual Trading
and Doing Business as GLANDULAR PROD-
UCTS COMPANY and DYBUTOL COM-
PANY, and ALLEN H. PARKINSON, an
Individual Trading and Doing Business as
TIDE MAILING SERVICE and MAR-
GARET M. WILLIS,

Defendants.

ORDER GRANTING AND DECREE OF
PRELIMINARY INJUNCTION

Plaintiff having filed a verified Complaint for In-
junction praying for a temporary restraining order,
a preliminary injunction, and a permanent injunc-
tion; and the Court having issued a Temporary Re-
straining Order; and the defendants having ap-
peared in response to an Order to Show Cause why
a preliminary injunction should not issue; and the
Court having considered the affidavits, briefs, and
arguments offered on behalf of all parties; and the
Court having issued an Order Extending Temporary
Restraining Order; and the Court having filed Pre-
liminary Findings of Fact and Preliminary Con-

clusions of Law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure;

It Is Therefore Ordered that plaintiff's prayer for a preliminary injunction be, and it hereby is, granted, and that the defendants Wayne A. Parkinson, Allen H. Parkinson, and Margaret M. Willis, and each and all of their [72] agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, be and they are hereby preliminarily enjoined and restrained during the pendency of this litigation and until the final determination thereof from doing any of the following acts, directly or indirectly, in violation of Section 301(a) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 331(a)] with respect to any of the articles of drug hereinafter enumerated—namely,

Adler's Compound Standard Strength,
Adler's Compound Super Strength,
Vita-Glan Male Formula, Regular Strength,
Vita-Glan Male Formula, Double Strength,
Bio-Glan Male Formula, Regular Strength, together with Bio-Glan Fortified Wheat Germ Oil,
Bio-Glan Male Formula, Double Strength, together with Bio-Glan Fortified Wheat Germ Oil,

or other similar drugs, or other drugs offered for similar purposes, namely, for overcoming male sexual weakness or impotence:

(1) Introducing or causing to be introduced or delivering or causing to be delivered for introduction into interstate commerce any such article of drug which is:

(a) Misbranded within the meaning of Section 502(a) of the Act [21 U.S.C. 352(a)] by reason of any representation or suggestion in its labeling which conveys the impression that such article or any of the other articles enumerated above is efficacious in overcoming male sexual weakness or impotence; or

(b) Misbranded within the meaning of Section 502(a) of the Act [21 U.S.C. 352(a)] by reason of any representation or suggestion in its labeling which conveys the impression that such article or any of the other articles enumerated above is efficacious in overcoming nervousness, loss of muscle tone, vague aches and pains, fatigue, irritability, headaches, dizziness, weakness, mental depression, insomnia, digestive upsets, loss of appetite, neuritis, backache, or mental dullness; or

(c) Misbranded within the meaning of Section 502(a) of the Act [73] [21 U.S.C. 352(a)] by reason of any other false or misleading representation in its labeling; or

(d) Misbranded within the meaning of Section 502(f)(1) of the Act [21 U.S.C. 352(f)(1)] in that its labeling does not bear adequate directions for use because it does not contain a statement of all

the purposes and conditions for which the article is intended by the defendants.

It Is Further Ordered that this preliminary injunction shall remain in effect until after final disposition of this cause by the Court after trial on the merits, and until it is expressly dissolved; and

It Is Further Ordered that this Court expressly retain jurisdiction over the subject matter and parties herein in order that it may issue such further Orders and Decrees as may be necessary to the proper disposition of this proceeding.

Dated: March 11, 1954.

/s/ JAMES M. CARTER,
United States District Judge.

Receipt of Copy acknowledged.

Lodged March 10, 1954.

[Endorsed]: Filed March 11, 1954.

Judgment docketed and entered March 11, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Wayne A. Parkinson, Allen H. Parkinson, and Margaret M. Willis, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order Granting and Decree of Preliminary In-

junction docketed and entered in this action on March 11, 1954.

Dated: May 4, 1954.

EDWIN M. ROSENDAHL,

/s/ EDWIN M. ROSENDAHL,

Attorney for Appellants, Wayne A. Parkinson, Allen H. Parkinson, and Margaret M. Willis.

Affidavit of service by mail attached.

[Endorsed]: Filed May 4, 1954. [75]

[Title of District Court and Cause.]

STIPULATION FOR DISMISSAL OF
APPEAL

It is hereby stipulated by and between the parties hereto, through their respective counsel, that the appeal of the defendants in the within matter be dismissed.

The reason for this stipulation is that the defendants have voluntarily agreed to dismiss the appeal, and to limit the litigation herein to other portions of plaintiff's complaint not covered by the appeal.

Dated: July 20, 1954.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,

Assistant U. S. Attorney,
Chief of Civil Division,

/s/ MAX F. DEUTZ,

Assistant U. S. Attorney
Attorneys for Plaintiff,

/s/ EDWIN M. ROSENDAHL,

Attorney for all defendants.

Good cause appearing therefor, it is hereby ordered that the appeal of the defendants herein, be dismissed, and that the defendants' bond for costs be, and the same is hereby exonerated.

Dated this 26 day of July, 1954.

/s/ JAMES M. CARTER,

United States District Judge.

[Endorsed]: Filed July 26, 1954. [78]

[Title of District Court and Cause.]

FINAL CONSENT JUDGMENT AS TO
PERMANENT INJUNCTION ONLY

Plaintiff having filed a verified complaint for injunction; and the Court having issued a temporary restraining order, preliminary findings of fact and conclusions of law, and a preliminary injunction; and upon the consent of all parties, before any testimony has been taken, and without any additional finding by the Court on any issue of fact or law;

and without any admission by the defendants regarding the truth of the allegations in the Complaint by reason of the entry of this Final Consent Judgment; it is

I.

Ordered, adjudged, and decreed that this Court has jurisdiction of the subject matter hereof and of all the parties herein; and it is further [79]

II.

Ordered, adjudged, and decreed that the defendants, Wayne A. Parkinson, Allen H. Parkinson, and Margaret M. Willis, and each and all of their agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, be and they are hereby permanently enjoined and restrained from doing any of the following acts, directly or indirectly, in violation of Section 301(a) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 331(a)] with respect to any of the articles of drug hereinafter enumerated and described—namely,

Name of Drug: Adler's Compound (Standard Strength)

Composition of Drug

Each tablet contains:

Potassium Sulphate	1.5 mg.
Vitamin B1	1.5 mg.
Vitamin C	5.0 mg.
Niacinamide	5.0 mg.
Caffein	0.5 gr.

Molybdenum as present in Sodium

Molybdenate	0.2 mg.
Calcium Pantothenate	2.5 mg.
Vitamin B12	1.5 mg.

Wheat Germ Oil fortified with D-Alpha

Tocopherol Succinate equivalent by
biological assay to 5 International
Units of Vitamin E

The above contents are amalgamated in a base of inert testicular powders, prostate substance, glandular tissue, and other excipients.

Name of Drug: Adler's Compound
(Super Strength)

The composition of each tablet is identical with that of Adler's Compound (Standard Strength) [80]

Name of Drug: Vita-Glan Male Formula
(Regular Strength)

Composition of Drug

Each tablet contains:

Vitamin B ₁	5 mg.
Vitamin B ₂	3.5 mg.
Niacinamide	15 mg.

The above contents are in a base of Orchic, Pancreatin, Prostate, and Adrenal Gland Substances, plus other excipients.

Name of Drug: Vita-Glan Male Formula
(Double Strength)

The composition of each tablet is identical with that of Vita-Glan Male Formula (Regular Strength)

Name of Drug: Bio-Glan Male Formula
(Regular Strength)

The composition of each tablet is identical with that of Vita-Glan Male Formula (Regular Strength)

Name of Drug: Bio-Glan Male Formula
(Double Strength)

The composition of each tablet is identical with that of Vita-Glan Male Formula (Regular Strength)

Name of Drug: Bio-Glan Fortified Wheat Germ Oil

Each perle contains Wheat Germ Oil fortified with d-alpha tocopherol acetate equivalent by biological assay to Five International Units of Vitamin E (with color added to gelatin perle), or other similar drugs, or other drugs offered for similar purposes, namely, for overcoming male sexual weakness or impotence:

(1) Introducing or causing to be introduced or delivering or causing to be delivered for introduction into interstate commerce any such article of drug which is:

(a) Misbranded within the meaning of Section 502(a) of the Act [21 U.S.C. 352(a)] by reason of any representation or suggestion in its labeling

which conveys the false and misleading impression that such article or any of the other articles described above is efficacious in overcoming male sexual [81] weakness or impotence; or

(b) Misbranded within the meaning of Section 502(a) of the Act [21 U.S.C. 352(a)] by reason of any representation or suggestion in its labeling which conveys the false and misleading impression that such article or any of the other articles described above is efficacious in overcoming nervousness, loss of muscle tone, vague aches and pains, fatigue, irritability, headaches, dizziness, weakness, mental depression, insomnia, digestive upsets, loss of appetite, neuritis, backache, or mental dullness; or

(c) Misbranded within the meaning of Section 502(a) of the Act [21 U.S.C. 352(a)] by reason of any representation or suggestion in its labeling which conveys the false and misleading impression that such article or any of the other articles described above is manufactured in a foreign country only and is available in the United States in limited supply; or

(d) Misbranded within the meaning of Section 502(a) of the Act [21 U.S.C. 352(a)] by reason of any representation or suggestion in its labeling which conveys the false and misleading impression that such article or any of the other articles described above is a new or amazing medical miracle developed by foreign pharmaceutical knowledge and ingenuity; or

(e) Misbranded within the meaning of Section 502(a) of the Act [21 U.S.C. 352(a)] by reason of any representation or suggestion in its labeling which conveys the false and misleading impression that such article or any of the other articles described above, if designated as “super strength” or “double strength,” has a different composition and greater potency than a similar article designated as “standard strength” or “regular strength”; or

(f) Misbranded within the meaning of Section 502(a) of the Act [21 U.S.C. 352(a)] by reason of any photograph of a professional model in its labeling which, together with other representations or suggestions, conveys the false and misleading impression that the person who posed for such photograph is a scientist who manufactures, distributes or approves of such article or any of the other articles described above; or

(g) Misbranded within the meaning of Section 502(a) of the Act [21 U.S.C. 352(a)] by reason of any representation or suggestion in its labeling [82] which conveys the false and misleading impression that such article or any of the other articles described above is marketed upon the advice and guidance of a non-existing “medical director”; or

(h) Misbranded within the meaning of Section 502(a) of the Act [21 U.S.C. 352(a)] by reason of any representation or suggestion in its labeling which creates the false and misleading impression that the use of such article or of any of the other articles described above creates such a rapid sexual

rejuvenation in males previously lacking in sexual power as to warrant the use of an anaesthetic ointment to retard the male sexual climax; or

(i) Misbranded within the meaning of Section 502(a) of the Act [21 U.S.C. 352(a)] by reason of any other false or misleading representation or suggestion in its labeling; or

(j) Misbranded within the meaning of Section 502(f)(1) of the Act [21 U.S.C. 352(f)(1)] in that its labeling does not bear adequate directions for use because it does not state all of the purposes and conditions for which the article is intended; and it is further

III.

Ordered, Adjudged, and Decreed that each of said defendants shall call this Final Consent Judgment to the attention of all of his or her agents, employees, servants, or distributors who now or hereafter sell or offer for sale or otherwise assist in marketing any of the articles of drug described above, and shall require each such person to sign a written statement that he or she has read this Judgment; and said defendants shall maintain a file of such statements and permit a duly authorized representative of the Department of Health, Education, and Welfare, at any reasonable time, to have access to them and to copy them; and it is further

IV.

Ordered, Adjudged, and Decreed that jurisdiction of this Court is retained for the purpose of enabling

any of the parties to this Judgment to apply at any time for such further orders and directions as may be necessary or [83] appropriate for the construction or carrying out of this Judgment or for modification of any of the provisions thereof and for the purpose of enforcing compliance therewith and the punishment of violations thereof; nor shall anything herein prejudice the right of any party to move the Court for modification of this Judgment in the event of changed conditions of law, fact, or scientific opinion; and it is further

V.

Ordered, Adjudged, and Decreed that only a violation of Part II of this Judgment shall constitute a violation of the Federal Food, Drug, and Cosmetic Act within the meaning of 21 U.S.C. 332(b); and it is further

VI.

Ordered, Adjudged, and Decreed that the question of restitution is specifically reserved and is not a part of this Judgment, and that said question shall be subject to subsequent determination by this Court; and it is further

VII.

Determined, pursuant to Civil Rule 54(b), that while this Judgment does not adjudicate all of the claims for relief presented in this action, there is no just reason for delay in entering this Judgment; and it is further

VIII.

Directed that this Judgment shall be entered forthwith.

Dated: November 5, 1954.

/s/ JAMES M. CARTER,
United States District Judge.

We hereby consent to the entry of the foregoing Judgment and we each [84] acknowledge receipt of a copy thereof.

LAUGHLIN E. WATERS,
United States Attorney,

/s/ MAX F. DEUTZ, **J.L.B.**
Assistant United States Attorney, Chief of Civil
Division, Attorneys for Plaintiff.

/s/ EUGENE M. ELSON,
/s/ EDWIN M. ROSENDAHL,
Attorneys for Defendants.

/s/ WAYNE A. PARKINSON,
/s/ ALLEN H. PARKINSON,
/s/ MARGARET M. WILLIS,
Defendants.

[Endorsed]: Filed November 5, 1954.

Docketed and entered November 5, 1954. [85]

[Title of District Court and Cause.]

STIPULATION AND ORDER RE ISSUE OF RESTITUTION

This Court having approved and entered a "Final Consent Judgment as to Permanent Injunction Only" which adjudicates most of the issues in this case; the parties to this proceeding, through their respective counsel, hereby stipulate as follows subject to the approval of the Court:

(1) The only dispute between the parties which the parties themselves cannot resolve relates to the plaintiff's prayer for restitution as stated in the penultimate paragraph of the Complaint for Injunction.

(2) This dispute may be divided into two parts—namely,

(a) Does the District Court in this case have discretionary power, ancillary to its jurisdiction to grant injunctive relief under 21 U.S.C. 332(a), to compel a defendant who has sold drugs in violation of the Federal Food, Drug and Cosmetic Act, to tender a refund of the purchase money to [86] customers who have bought those drugs?

(b) If it is within the Court's jurisdiction to issue an order of restitution, should it issue such an order in this case?

(3) For the purpose of deciding the issue stated in paragraph (2)(a) only, all of the allegations of the Complaint for Injunction, as well as the con-

tents of and exhibits attached to the affidavits filed on behalf of the plaintiff, are true. Defendants retain the right to object to the consideration by the Court of any facts alleged in the Complaint or appearing in any other documents or exhibits on the ground that they are irrelevant or should not be considered by the Court in deciding the issue stated in paragraph (2)(a).

(4) The issue stated in paragraph (2)(a) involves a significant question of first impression in food and drug cases. The parties propose that this issue be briefed and argued in accordance with the following schedule:

January 4, 1955—Plaintiff's brief due.

February 28, 1955—Defendants' brief due.

March 28, 1955—Plaintiff's reply brief due.

April, 1955—Oral argument to be set in April.

(5) If the issue stated in paragraph (2)(a) is resolved in favor of the plaintiff, the parties will take all steps necessary to facilitate a decision with respect to the issue stated above in paragraph (2)(b), by bringing all facts pertinent to that issue before the Court as expeditiously as possible.

Dated: November 5th, 1954.

LAUGHLIN E. WATERS,

United States Attorney,

/s/ MAX F. DEUTZ,

J.L.B.

Assistant United States Attorney, Attorneys for
Plaintiff.

/s/ EUGENE M. ELSON,

/s/ EDWIN M. ROSENDAHL,
Attorneys for Defendants.

It Is So Ordered this 5th day of November, 1954.

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed November 5, 1954.

Docketed and entered November 5, 1954. [88]

[Title of District Court and Cause.]

MINUTES OF THE COURT—JULY 25, 1955

Hon. James M. Carter, District Judge.

Proceedings:

For separate trial on the issue of restitution only, pursuant to the provisions of the decree entered herein Nov. 5, 1954.

Court makes a statement, and it is stipulated and ordered that the proceedings today will be limited to separate trial on the question of whether the Court has jurisdiction in its discretion to require restitution, leaving for another time the further separate trial and determination of whether such restitution should be granted, if the Court determines after today's proceedings that it has such jurisdiction.

Attorney Deutz argues to the Court for government.

Attorney Elson argues to the Court for defendants.

It Is Ordered that the cause stand Submitted on said issue.

JOHN A. CHILDRESS,
Clerk;

By /s/ L. B. FIGG,
Deputy Clerk. [89]

[Title of District Court and Cause.]

OPINION

Appearances:

LAUGHLIN E. WATERS,
United States Attorney;
MAX DEUTZ,
Asst. United States Attorney,
Attorneys for Plaintiff.

EUGENE M. ELSON,
Attorney for Defendant. [90]

This case poses the question as to whether the district court has power to order restitution in an injunction proceeding under the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. 331-392; Act of June 25, 1938, Chap. 675, 52 Stat. 1040].

The case is one of first impression under the Food and Drug laws, although the problem has been discussed recently in law reviews and journals.¹

The matter was heretofore heard on an application for a preliminary injunction, and a decree of preliminary injunction was made and entered March 11, 1954. Thereafter a final consent judgment, as to permanent injunction only, was made and entered on November 5, 1954.

The complaint, in addition to praying for general injunctive relief, prayed "that the defendants be ordered to tender to all present and past purchasers of the drugs enumerated * * * a refund of all amounts collected by said defendants from said purchasers." By stipulation of the parties, the question is presented as to whether the district court had discretionary power, ancillary to its jurisdiction to grant injunctive relief under 21 U.S.C.A. 332(a), to compel the defendants to refund to purchasers the money paid for the drugs involved in the action, and whether the court has jurisdiction to issue such an order. The question as to whether the court should exercise this power, if it possesses it, is reserved by the stipulation for further hearing if necessary.

21 U.S.C.A. Sec. 332(a) reads:

"Injunction proceedings — Jurisdiction of courts (a) The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause

shown, and subject to the provisions of Sec. 381 (relating [91] to notice to opposite party) of Title 28, as amended, to restrain violations of section 331 of this title, except paragraphs (e), (f), and (h)-(j). [Act of June 25, 1938, chap. 675, Sec. 302, 52 Stat. 1043]”

We are not concerned with the exceptions.

We start with the axiomatic premise that the district court is one of limited jurisdiction, and has only the power and the jurisdiction spelled out in the statutory enactments of Congress. We exclude from consideration the general equity power of the court called into play in a diversity suit, and also exclude those situations in which, by statute, the Congress has expressly provided that the court may exercise all the powers of a court of equity. We also exclude from consideration the power of a district court to compel compliance with its orders when violated or threatened to be violated, (*McComb v. Jacksonville Paper Co.* [1949] 336 U.S. 187, 193). Sec. 332(b) 21 U.S.C.A., expressly makes reference to a violation of the injunction, and proceedings thereon.

The plaintiffs predicate their argument on analogy to (a) the Rent and Price Control cases, (b) Fair Labor Standard cases, and (c) the Anti-trust cases.

1.

The Rent Control cases.

In *Porter v. Warner Holding Co.* [1946] 328 U.S. 395, the trial court and the court of appeals both held there was no jurisdiction under the statute to order restitution. The Supreme Court reversed. The statute involved was Sec. 205(a) of the Emergency Price Control Act of 1942, 50 U.S.C.A. App., Sec. 925(a) [56 Stat. 23, 33]. It provided that the administrator might apply to the appropriate court * * * “for an order enjoining such acts or practices, or for an order [92] enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.” [Emphasis added.]

Sec. 205(a) of the Emergency Price Control Act of 1942 [50 U.S.C.A. App. Sec. 925(a)] first reached the Supreme Court in *Hecht Co. v. Bowles* [1944] 321 U.S. 321. The Supreme Court held that the court could, under the statutory language involved, fashion an appropriate decree to obtain compliance, and at page 328, said:

“It seems apparent on the face of § 205(a) that there is some room for the exercise of discretion on the part of the court * * * Though the Administrator asks for an injunction, some ‘other order’ might be more appropriate * * * Such an order, moreover, would seem to be a

type of 'other order' which a faithful reading of § 205(a) would permit a court to issue in a compliance proceeding."

In the Warner Holding case (*supra*) the Supreme Court, in reversing, rested jurisdiction to issue a mandatory restitution order on two theories, (1) "as an equitable adjunct to an injunction decree" and (2) "as an order appropriate and necessary to enforce compliance with the Act." (p. 399-400). It said at page 399:

"As recognized in *Hecht v. Bowles* * * * the term 'other order' contemplates a remedy other than that of injunction or restraining order, a remedy entered in the exercise of the District Court's equitable discretion." [93]

Both the *Hecht Co.* case, (*supra*) and the Warner Holding Co. case, (*supra*) considered legislative history of the statute and Sen. Rep. 931, 77th Cong. 2d Session.²

A portion of the report, quoted in the Warner Holding Co. case, (*supra*) read, "Such courts are given jurisdiction to issue whatever order to enforce compliance is proper in the circumstances of each particular case." (p. 401).

Subsequently, the Supreme Court in *U.S. v. Moore* [1951] 340 U.S. 616, referring to its decision in *Porter v. Warner Holding Co.* (*supra*), stated, page 619-620:

"This Court reversed, concluding that an order of restitution was a proper 'other order.' This

interpretation was required to give effect to the congressional purpose to authorize whatever order within the inherent equitable power of the District Court may be considered appropriate and necessary to enforce compliance with the Act * * *

“Adhering to the broad ground of interpretation of the ‘other orders’ provision adopted in the Warner case, we think the order for restitution entered by the District Court in this section was permissible under Section 206(b).”³

We are constrained to believe that *Porter v. Warner Holding Co.* (supra) is authority upon the second proposition, namely that a district court had power to grant an order appropriate and necessary to enforce compliance with the Act, based upon the particular wording of the statute. The other ground was not necessary for the decision. Although considered as dicta, it bears great weight, nevertheless we do not believe that the holding of the Warner case should be so extended. [94]

Since the statute in the case at bar does not contain the reference to “an order enforcing compliance” or “other order” we do not consider the rent cases as decisive of our problem.

2.

The Fair Labor Standards cases.

The Fair Labor Standards Act [29 U.S.C.A. Sec. 201-219] and the Federal Food, Drug, and Cosmetic

Act [21 U.S.C.A. Sections 301-392] were enacted on the same day. [June 25, 1938, 52 Stat. 1060 and 1040 respectively.] Both statutes contained provisions for equitable relief that were almost identical.⁴

Several appellate court cases ruled that restitution of back pay could properly be ordered as an adjunct to an injunction under Section 17 of the Fair Labor Standards Act, [Sec. 217 U.S.C.A. Title 29] which required the rehiring of a discharged employee. *McComb v. Frank Scerbo & Sons*, 177 F. 2d 137, 138-139 (C.A. 2, 1949); *Walling v. O'Grady*, 146 F. 2d 422, 423 (C.A. 2, 1949). Cf. *Walling v. Miller*, 138 F. 2d 629 (C.A. 8, 1943) which held that the district court had power to embody a restitution order in a consent decree.

The Supreme Court however, never ruled on the question expressly, leaving it open in *McComb v. Jacksonville Paper Co.* [1949] 336 U.S. 187-193.

But Congress, concerned with the appellate courts' interpretations of Sec. 17 of the Fair Labor Standards Act [Sec. 217, U.S.C.A. Title 29] amended the section to provide in express terms that restitution was not authorized under the section, [Act of Oct. 26, 1949, Chap. 736, Sec. 15, 63 Stat. 919] and other statutory provisions were enacted relating to restitution suits.⁵

This blunt repudiation by Congress of the asserted powers of a district court to order restitution under Fair [95] Labor Standards Act, with its almost identical provision to that of Sec. 302(a) of the Food and Drug Act [Sec. 332(a) U.S.C.A. Title

21], is significant and convincing insofar as this court is concerned.

3.

The Antitrust cases.

The government also relies for authority on the injunction suits to restrain violations of the Sherman Act, [15 U.S.C.A. Sec. 4] where the courts have sustained the remedy of divestiture; and cites *Schine Chain Theatres, Inc., v. United States* [1948] 334 U.S. 110, holding divestiture to be an equitable remedy and comparing it to restitution; and *United States v. Paramount Pictures* [1948] 334 U.S. 131 to the same effect.

We are not convinced. The Sherman Act in Sec. 4 U.S.C.A. Title 15, [Act of July 2, 1890, Chap. 647, Sec. 4, 26 Stat. 209 as amended] provides, "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several district attorneys of the United States * * * under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations." [Emphasis added.] This language, read as a whole, clearly empowers the district court with all the remedies of equity. The decisions cited above are then easily understood.

Nor is divestiture as applied by the courts, the equivalent of restitution. Divestiture requires the defendant to sell his offending interest or stock or properties or to divest himself of his holdings. He is deprived of the offending property at a price. [96]

He is not required to restore monies to his competitors by such a decree, though they may, in certain instances, have the remedy of a treble damage suit expressly provided by statute.

Conclusion

There are fundamental differences in purpose between the Rent and Price Control legislation and the Fair Labor Standards Act on the one hand, and the Federal Food, Drug, and Cosmetic Act on the other. They have been well stated by Rhyne, "Penalty through Publicity; FDA's Restitution Gambit, 7 Food, Drug, Cosmetic L.J. 666-680 [1952],

"The payment of prescribed sums of money is the essence and purpose of the Fair Labor Standards Act, and also of rent and price control laws. Effectuation of the policies of these laws requires the payment of proper sums. But the Federal Food, Drug, and Cosmetic Act is not concerned with payment of money. Its purpose, or as much of it as it relevant here, is to prevent misbranding; that purpose can be accomplished by a restraining order."

Restitution, apart from its equitable considerations may also be considered punitive. It is a further method of punishing a defendant in that it requires him to pay over monies in his possession to others. There is a line of authorities that "an injunction is primarily a preventive remedy; it looks to the future rather than to the past. It is not for the purpose of punishing for wrongful acts already committed," High Grade Food Products

Corp. v. United States [8 Cir. 1947] 160 F. 2d 816, and cases cited at page 819; Minneapolis & St. Louis Ry. Co. v. Pacific Gamble Robinson Co. [8 Cir. 1950] 181 F. 2d 812 at 814; American Chicle Co. v. Topps Chewing Gum [2 Cir. 1954] 210 F. 2d 680 at 683. [97]

We conclude that the remedy of restitution is not within the powers of the district court under the statute. The Food, Drug and Cosmetic Act has provided the sanctions of (1) criminal prosecution and punishment of violators [21 U.S.C.A., Sec. 333], (2) seizure of goods shipped in violation of the Act [21 U.S.C., Sec. 334 (a)], and (3) injunctions against further violations [21 U.S.C.A., Sec. 332 (a)]. There is no indication in Congressional history that supports any other sanction or specifically the power to order restitution under the Food, Drug and Cosmetic Act. The contrary was true in the Congressional history of the Emergency Price Control Act.

The government's arguments that such power in a district court are necessary to effect the essential objectives of the Act and to protect the public's pocketbook should be addressed to Congress, not to a district court. The jurisdiction and power of this court stem not from things necessary or desirable, but from Congressional action.

The defendants will submit an order denying plaintiff relief under its prayer for restitution. Pursuant to the stipulation of the parties there remains nothing further to be done in this case. This order denying such relief concludes the case and should therefore be final and appealable. [98]

Footnotes

¹Rhyne, *Penalty Through Publicity: FDA's Restitution Gambit*, 7 Food, Drug, Cosmetic L.J. 666-680 (1952).

Noland, *Section 302(a) of the Federal Food, Drug, and Cosmetic Act: Restitution Re-examined*, 7 Food, Drug, Cosmetic L.J. 373-400 (1952).

Lev, *The Nutrilite Consent Decree*, 7 Food, Drug, Cosmetic L.J. 56, 65-67 (1952).

Developments in the Law—The Federal Food, Drug, and Cosmetic Act, 67 Harv. LR 632, 718-720 (1954).

Levine, *Restitution—A New Enforcement Sanction*, 6 Food, Drug, Cosmetic L.J. 503-514 (1951).

Goodrich, *Modern Application of an Ancient Remedy*, 9 Food, Drug, Cosmetic L.J. 565-572 (1954).

“Restitution in Food and Drug Enforcement,” note in 4 Stan. L. Rev. 519-536 (1952).

²The Hecht case cited page 25, the Warner Holding case page 10 of the report.

³U. S. v. Moore involves section 206(b) of the Housing and Rent Act of 1947 as amended. This section contains the same “other order” language found in Sec. 205(a) of the Emergency Price Control Act of 1942, involved in *Porter v. Warner Holding Co.* (supra).

⁴Section 17 of the Fair Labor Standards Act [52 Stat. 1069]:

“The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled, ‘An act to supplement existing laws against unlawful restraints and monopolies, and for other [99] purposes’ approved October 15, 1914, as amended (U.S.C. 1934 edition, title 28, sec. 381), to restrain violations of section 15.”

⁵Section 16(c) [21 U.S.C.A., Section 216(c)] was amended and Congress thereby created a special statutory pattern designed (1) to permit an independent suit by the Administrator to collect back pay on behalf of employees, and (2) to protect employers from double litigation by declaring that the employee's consent to such suit constituted a waiver of the employee's statutory right to sue in his own behalf.

[Endorsed]: Filed October 21, 1955. [100]

In the United States District Court for the Southern District of California, Central Division

No. 16415-C

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WAYNE A. PARKINSON, an Individual Trading and Doing Business as Glandular Products Company and Dybutol Company, and ALLEN H. PARKINSON, an Individual Trading and Doing Business as Tide Mailing Service, and MARGARET M. WILLIS,

Defendants.

FINAL JUDGMENT DENYING PLAINTIFF'S
PRAYER FOR RESTITUTION

All issues in the above-entitled action, except the issue of restitution having heretofore been disposed of by a "Final Consent Judgment as to Permanent

Injunction Only”; and the issue of restitution having been presented to this court in two parts by “Stipulation and Order re Issue of Restitution”—the first part dealing with whether the court has the power to issue an order of restitution in this cause, and the second part dealing with whether the court should exercise such power herein, if it possesses it; and the court having concluded that it is without jurisdiction to issue an order of restitution in this cause, and that, therefore, it is unnecessary [101] that it decide whether it would issue such an order if it had the power to do so, it is

Ordered, Adjudged and Decreed that plaintiff’s prayer in its complaint for injunction “that the defendants be ordered to tender to all present and past purchasers of the drugs enumerated * * * a refund of all amounts collected by said defendants from said purchasers” is hereby denied.

Dated: This 15th day of November, 1955.

/s/ JAMES M. CARTER,

United States District Judge.

Approved as to form:

LAUGHLIN E. WATERS,

United States Attorney;

/s/ MAX F. DEUTZ,

Assistant United States Attorney, Chief of Civil Division.

Docketed and entered November 16, 1955. [102]

[Endorsed]: Filed November 15, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Judgment Denying Plaintiff's Prayer for Restitution, dated November 15, 1955, and docketed and entered in this action on November 16, 1955.

Dated this 12th day of January, 1956.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ MAX F. DEUTZ,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

[Endorsed]: Filed January 12, 1956. [103]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered 1 to 110, inclusive, contain the original:

Complaint;
Affidavit in Support of Prayer for Temporary Restraining Order;
Temporary Restraining Order;
Order to Show Cause;
Affidavit of Dr. Edwin W. Hirsch in Support of Preliminary Injunction;
Order Extending Temporary Restraining Order;
Preliminary Findings of Fact and Conclusions of Law;
Order Granting and Decree of Preliminary Injunction;
Notice of Appeal, filed May 4, 1954;
Stipulation for Dismissal of Appeal;
Final Consent Judgment as to Permanent Injunction Only;
Stipulation and Order re Issue of Restitution;
Opinion;
Final Judgment Denying Plaintiff's Prayer for Restitution;
Notice of Appeal, filed January 12, 1956;
Letter Addressed to Clerk, U. S. District Court;
Designation of Contents of Record on Appeal;
Statement of Points on Which Appellant Intends to Rely;

And a full, true and correct copy of the Minutes of the Court on July 25, 1955; all in the above-entitled cause constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit in said cause.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has not been paid by appellant.

Witness my hand and the seal of said District Court this 9th day of February, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15032. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Wayne A. Parkinson, an Individual Trading and Doing Business as Glandular Products Company and Dybutol Company, and Allen H. Parkinson, an Individual Trading and Doing Business as Tide Mailing Service, and Margaret M. Willis, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 10, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit
C.A. No. 15032

UNITED STATES OF AMERICA,
Appellant,
vs.

WAYNE A. PARKINSON, an Individual Trading
and Doing Business as Glandular Products
Company and Dybutol Company, and ALLEN
H. PARKINSON, an Individual Trading and
Doing Business as Tide Mailing Service, and
MARGARET M. WILLIS,
Appellees.

STATEMENT OF POINTS ON WHICH AP-
PELANT INTENDS TO RELY ON AP-
PEAL

Pursuant to the rules of the Ninth Circuit Court of Appeals the Appellant, United States of America, now designates the following points on which it intends to rely on appeal:

(1) The District Court erred in holding in substance that a District Court may not exercise all of the powers of a court of equity in a statutory injunction proceeding under 21 U.S.C. 332(a).

(2) The District Court erred in holding in substance that the Federal Food, Drug, and Cosmetic Act is not concerned with protecting the public from the payment of money for worthless drugs.

(3) The District Court erred in holding in substance that restitution may be considered a punitive remedy in that it requires a defendant to pay over monies in his possession to others.

(4) The District Court erred in holding in substance that it does not have discretionary power, ancillary to its jurisdiction to grant injunctive relief under 21 U.S.C. 332(a), to compel the defendants to refund to purchasers the money paid for the drugs involved in this action.

(5) The District Court erred in denying plaintiff's prayer in its Complaint for Injunction "that the defendants be ordered to tender to all present and past purchasers of the drugs enumerated * * * a refund of all amounts collected by said defendants from said purchasers."

Dated: This 20th day of February, 1956.

LAUGHLIN E. WATERS,

United States Attorney;

MAX F. DEUTZ,

Assistant U. S. Attorney,

Chief of Civil Division;

ARTHUR A. DICKERMAN,

Attorney, Department of Health Education and Welfare;

By /s/ MAX F. DEUTZ,

Attorneys for Appellant.

[Endorsed]: Filed February 21, 1956.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER FOR THE USE
OF ORIGINAL EXHIBITS IN LIEU OF
PRINTING

It Is Hereby Stipulated by and between counsel for the Appellant and counsel for the Appellees

that, subject to the approval of this Court, the original exhibits, numbered 1 to 19, attached to the Complaint on file herein and made a part of the record on appeal to this Court, may be considered by the Court in their original form and need not be printed.

The reason for this Stipulation is that due to the length of said exhibits and the character of said exhibits it would not be feasible to print the same, and the use of the original exhibits will not impair the Court's consideration of the same.

Dated this 24th day of February, 1956.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

ARTHUR A. DICKERMAN,
Attorney, Department of Health, Education and
Welfare;

By /s/ MAX F. DEUTZ,
Attorneys for Appellant.

DANIELS, ELSON &
MATHEWS,

/s/ EUGENE N. ELSON,
Attorneys for Appellees.

[Endorsed]: Filed February 27, 1956.

No. 15032

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

WAYNE A. PARKINSON, an individual Trading and Doing Business as Glandular Products Company and Dybutol Company, and ALLEN H. PARKINSON, an Individual Trading and Doing Business as Tide Mailing Service, and MARGARET M. WILLIS,

Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division

APPELLANT'S BRIEF

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FILED

JUN -5 1936

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

PAGE

I.

Statement of jurisdiction.....	1
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II.

Statement of facts.....	2
A. Summary of proceedings.....	2
B. The factual background of the government's prayer for restitution	4

III.

Question presented	13
--------------------------	----

IV.

Pertinent statutory provisions.....	13
-------------------------------------	----

V.

Summary of argument.....	14
A. The equitable power of the District Court.....	14
B. The rent and price control cases.....	15
C. The fair labor standards cases.....	15
D. The anti-trust cases.....	16
E. Restitution as a remedy under the injunction provisions of the Federal Food, Drug, and Cosmetic Act.....	17

VI.

Argument	18
A. The equitable power of the District Court.....	18
B. The rent and price control cases.....	26
C. The fair labor standards cases.....	34
D. The anti-trust cases.....	39
E. Restitution as a remedy under the injunction provisions of the Federal Food, Drug, and Cosmetic Act.....	41

VII.

Conclusion	52
------------------	----

TABLE OF AUTHORITIES CITED

CASES	PAGE
Atlas Life Insurance Co. v. Southern, 306 U. S. 563.....	24
Bowen v. Hockley, 71 F. 2d 781.....	24
Bradley v. United States, 264 Fed. 79.....	10
Brown v. Board of Education of Topeka, 349 U. S. 294.....	24
Colgrove et al. v. United States, 176 F. 2d 614.....	4
Commercial National Bank in Shreveport v. Parsons, 144 F. 2d 231; cert. den., 323 U. S. 796.....	20
Creedon v. Randolph, 165 F. 2d 918.....	44
Ethyl Gasoline Corp. v. United States, 309 U. S. 436.....	44
Farley v. Heininger, 105 F. 2d 79; cert. den., 308 U. S. 587.....	11
Harris v. Rosenberger, 145 Fed. 449; cert. den., 203 U. S. 591..	10
Hecht Co. v. Bowles, 321 U. S. 321.....	19, 25
Holmberg v. Armbrecht, 327 U. S. 392.....	20
Hygrade Food Products Corp. v. United States, 160 F. 2d 816..	21
Jeffries v. Olsen, 121 F. Supp. 463.....	11
Kordel v. United States, 335 U. S. 345.....	47
Leach v. Carlisle, 267 Fed. 61; aff'd, 258 U. S. 138.....	12
Libby, McNeill & Libby v. United States, 148 F. 2d 71.....	4
McComb v. Frank Scerbo & Sons, 177 F. 2d 137.....	19, 34, 35, 36
McCoy v. Woods, 177 F. 2d 354.....	33
Missouri Drug Co. v. Wyman, 129 Fed. 623.....	12
Mitchell v. Chambers Construction Co., 214 F. 2d 515.....	19
Orenstein v. United States, 191 F. 2d 184.....	33
Pasadena Research Laboratories v. United States, 169 F. 2d 375; cert. den., 335 U. S. 853.....	46
Porter v. Lux, 157 F. 2d 756.....	19, 33
Porter v. Warner Holding Co., 328 U. S. 395.....	
.....	19, 26, 29, 31, 32, 33, 34, 36, 39, 41, 42, 50
Russell v. Todd, 309 U. S. 280.....	20
Schine Chain Theatres, Inc. v. United States, 334 U. S. 110..	39, 40

	PAGE
Stainback v. Mo Hock Ke Lok Po, 336 U. S. 368.....	20
Tobin v. Abelson, 103 F. Supp. 404.....	19
Tobin v. Pirchesky, 101 F. Supp. 484.....	19
United States v. Antikamnia Chemical Co., 231 U. S. 654.....	47
United States v. Bausch & Lomb Co., 321 U. S. 707.....	43
United States v. Chattanooga Bakery, Inc., reported in Klein- feld and Dunn, Federal Food, Drug, and Cosmetic Act— Judicial and Administrative Record 1949-1950 (C. C. H. 1951), pp. 241, 243-244.....	21
United States v. Crescent Amusement Co., 323 U. S. 173.....	44
United States v. El-O-Pathic Pharmacy, et al., 192 F. 2d 62..5,	47
United States v. 50¾ Dozen Bottles . . . Sulfa-Seb, 54 F. Supp. 759.....	10
United States v. Moore, 340 U. S. 616.....	29
United States v. Nelson Creamery Corp., No. 17522.....	45
United States v. Paramount Pictures, 334 U. S. 131.....	40
United States v. Parkinson, 135 F. Supp. 208.....	3
United States v. 7 Jugs . . . Dr. Salsbury's Rakos, etc., 53 F. Supp. 746.....	47
United States v. Sheff, 194 F. 2d 596.....	44
United States v. Sylvanus, 192 F. 2d 96; cert. den., 342 U. S. 943	10
United States v. United Mine Workers of America, 330 U. S. 258	42
United States v. Urbuteit, 335 U. S. 355.....	49
Virginian Railway Co. v. System Federation No. 40, 300 U. S. 515	46
Walling v. Miller, 138 F. 2d 629.....	34
Walling v. O'Grady, 146 F. 2d 422.....	19, 34, 35
Wilson v. Shaw, 204 U. S. 24.....	18
Woods v. McCord, 175 F. 2d 919.....	33
Yuba Consolidated Gold Fields v. Kilkeary, 206 F. 2d 884.....	24

HEARINGS AND REPORTS

PAGE

Hearings before a Subcommittee of the Committee on Commerce, U. S. Senate, 73rd Cong., 2nd Sess., on S. 1944 (Dec. 7 and 8, 1933), p. 78.....	22
House Report No. 1453, 81st Cong., 1st Sess.....	37
House Report No. 2139, 75th Cong., 3d Sess. (April 14, 1938), p. 2	48
House Report No. 2716, 75th Cong., 3d Sess. (June 11, 1938), p. 22	47
House Report No. 2755, 74th Cong., 2d Sess. (May 22, 1936), pp. 2, 3	48

STATUTES

Criminal Rule, Sec. 42(b).....	42
Emergency Price Control Act, Sec. 205(a)	28, 29
Emergency Price Control Act, Sec. 205(e).....	30
Fair Labor Standards Act, Sec. 16.....	38
Fair Labor Standards Act, Sec. 17	34, 35, 36, 38
Federal Food, Drug, and Cosmetic Act, Sec. 302(a)	18, 34
52 Statutes at Large, pp. 1040, 1060 (June 25, 1938).....	34
52 Statutes at Large, p. 1043.....	34
52 Statutes at Large, Sec. 16(b), p. 1069.....	35
63 Statutes at Large, p. 910.....	36
United States Code, Title 15, Sec. 4.....	39
United States Code, Title 18, Sec. 3691.....	42
United States Code, Title 21, Sec. 216(c).....	36
United States Code, Title 21, Sec. 331	13, 18, 23, 42
United States Code, Title 21, Sec. 332(a).....	
.....1, 13, 17, 18, 23, 41, 42, 45, 49, 51	
United States Code, Title 21, Sec. 332(b)	41, 42, 43, 44
United States Code, Title 21, Sec. 333.....	51
United States Code, Title 21, Sec. 334(a).....	51
United States Code, Title 21, Sec. 337.....	42

United States Code, Title 21, Sec. 352(a).....	12
United States Code, Title 21, Sec. 375(a).....	4
United States Code, Title 28, Sec. 381.....	13
United States Code, Title 28, Sec. 387.....	13
United States Code, Title 28, Sec. 1291.....	1
United States Code, Title 29, Sec. 217	19, 36
United States Constitution, Art. III, Sec. 1.....	20
United States Constitution, Art. III, Sec. 2.....	20

TEXTBOOKS

81 Congressional Record, March 9, 1937, part 2, p. 2007.....	22
Dunn, Federal Food, Drug, and Cosmetic Act (1938), pp. 709, 1102, a Statement of its Legislative Record.....	22
6 Food Drug Cosmetic Law Journal (1951), pp. 503-514, Le- vine, Restitution—A New Enforcement Sanction.....	50
7 Food Drug Cosmetic Law Journal (1952), pp. 373-400, No- land, Sec. 302(a) of the Federal Food, Drug, and Cosmetic Act	50
7 Food Drug Cosmetic Law Journal (1952), pp. 666-680, Rhyne, Penalty Through Publicity: FDA's Restitution Gambit	50
9 Food Drug Cosmetic Law Journal (1954), pp. 565-572, Goodrich, Modern Application of an Ancient Remedy.....	50
10 Food Drug Cosmetic Law Journal (1955), pp. 92-103, Wil- liam, If This Be Equity.....	50
Hart and Wechsler, The Federal Courts and the Federal Sys- tem (University Casebook Series, 1953), p. 1132.....	23
Hart and Wechsler, The Federal Courts and The Federal Sys- tem (University Casebook Series, 1953), p. 1133.....	32
67 Harvard Law Review (1954), pp. 632, 718-720, Develop- ments in the Law—The Federal Food, Drug and Cosmetic Act	50

	PAGE
1 Pomeroy, Equity Jurisprudence (5th Ed., 1941), Sec. 1.....	25
1 Pomeroy, Equity Jurisprudence (5th Ed., 1941), Sec. 3.....	25
1 Pomeroy, Equity Jurisprudence (5th Ed., 1941), Sec. 60, p. 78	25
4 Pomeroy, Equity Jurisprudence (5th Ed., 1941), Sec. 1337, pp. 934-935	23
4 Pomeroy, Equity Jurisprudence (5th Ed., 1941), Sec. 1349, pp. 953-955	23
Restatement of Law of Restitution, pp. 4-10.....	25
4 Stanford Law Review (1952), pp. 519-536, Note.....	50
2 Story, Commentaries on Equity Jurisprudence (14th Ed.), Sec. 1184, p. 553.....	18
2 United States Code Congressional Service, 81st Cong., 1st Sess. (1949), pp. 2241, 2251-2275.....	37

No. 15032
IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

WAYNE A. PARKINSON, an individual Trading and Doing Business as Glandular Products Company and Dybutol Company, and ALLEN H. PARKINSON, an Individual Trading and Doing Business as Tide Mailing Service, and MARGARET M. WILLIS,

Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division

APPELLANT'S BRIEF

I.

STATEMENT OF JURISDICTION

Under 21 U.S.C. 332(a), the District Court had jurisdiction to entertain the complaint for a statutory injunction filed in this case, and to restrain the defendants from further violations of the Federal Food, Drug, and Cosmetic Act. While the District Court did issue a permanent injunction as prayed, it denied that it had the power to order the defendants to tender restitution of the purchase price, as prayed for in the complaint, to those persons whom the defendants had induced to buy misbranded drugs. This was a final decision.

Under 28 U.S.C. 1291, this Court has jurisdiction to review the decision of the District Court to determine whether that Court does have power to order restitution in an injunction suit brought under 21 U.S.C. 332(a).

II. STATEMENT OF FACTS

A. Summary of Proceedings

A Complaint for Injunction was filed in the District Court on February 26, 1954, under the Federal Food, Drug, and Cosmetic Act to restrain the defendants from continued violations of that Act through the marketing of certain nostrums for sex rejuvenation. [R. 3-17]. The Complaint also asked that the Court order the defendants to restore the *status quo* by tendering restitution of the purchase price to those who had been induced to buy such nostrums. [R. 17].

On February 26, 1954, the District Court issued a Temporary Restraining Order without notice, which effectively halted defendants' nationwide distribution scheme for worthless sex-rejuvenator drugs. [R. 34-36].

On March 5, 1954, the District Court held a hearing on an Order to Show Cause why a preliminary injunction should not issue. [R. 36-37]. At the conclusion of that hearing, the District Court ruled that a preliminary injunction should issue in compliance with the local rules of the Court. On the same date, the District Court issued an Order Extending Temporary Restraining Order. [R. 43].

On March 11, 1954, the District Court filed Preliminary Findings of Fact and Conclusions of Law [R. 44-56] and an Order Granting and Decree of Preliminary Injunction. [R. 57-60].

On May 4, 1954, defendants filed a Notice of Appeal from the Order Granting and Decree of Preliminary Injunction. [R. 60-61]. On July 26, 1954, this appeal was dismissed on stipulation of the parties. [R. 61-62].

On November 5, 1954, the District Court approved and filed two documents—a Final Consent Judgment as to Per-

manent Injunction Only [R. 62-70] and a Stipulation and Order Re Issue of Restitution [R. 71-73]. The Consent Judgment permanently restrained defendants from the interstate distribution of drugs for sex rejuvenation. The Stipulation and Order described the restitution issue remaining before the Court and specified the mechanics for presenting and arguing that issue. It was also agreed that for the purposes of deciding the issue whether the District Court has discretionary power to order restitution in this action, all of the allegations of the Complaint for Injunction, as well as the contents of and Exhibits attached to the affidavits filed on behalf of the plaintiff, are true. [R. 71-72].

On July 25, 1955, argument was heard "on the question of whether the Court has jurisdiction in its discretion to require restitution, leaving for another time the further separate trial and determination of whether such restitution should be granted, if the Court determines . . . that it has such jurisdiction." [R. 73].

On October 21, 1955, the District Court handed down its opinion holding that it does not have the power to order restitution in a statutory injunction proceeding under the Federal Food, Drug, and Cosmetic Act. [R. 74-85; this opinion is also reported as *United States v. Parkinson*, 135 F. Supp. 208 (S. D. Calif., 1955)].

On November 15, 1955, the District Court filed a Final Judgment Denying Plaintiff's Prayer for Restitution which was docketed and entered on November 16, 1955. [R. 85-86].

On January 12, 1956, the United States, plaintiff below, filed a Notice of Appeal to this Court from the Final Judgment Denying Plaintiff's Prayer for Restitution. [R. 87].

B. The Factual Background of the Government's Prayer for Restitution.

For the six-year period 1948-1954, one or the other or both of the Parkinson brothers who are defendants—appellees in this suit were engaged in almost continuous violation of the Federal Food, Drug, and Cosmetic Act.

In exploiting the public through the sale of misbranded drugs, the Parkinsons developed a substantial mail-order business principally in the field of drugs offered as sex-rejuvenators. They have displayed considerable ingenuity in devising sales promotion techniques to stimulate purchaser demand for their newer drugs, as the hapless persons on their mailing lists lost interest in their older ones.

Early in 1948, Allen H. Parkinson, then trading as Hudson Products Company, embarked upon a widespread mail-order promotion of male and female sex hormones, representing that those drugs had remarkable powers of sexual rejuvenation. The hormones involved included methyl testosterone tablets and alpha-estradiol tablets. A four-count criminal information based upon that promotion was filed in the U. S. District Court for the Southern District of California and, on July 13, 1949, Allen H. Parkinson was convicted on all counts.¹ In announcing judgment of conviction, the District Court stated it was

¹See Drugs and Devices Notice of Judgment No. 2931. Such Notices of Judgment summarizing enforcement proceedings under the Federal Food, Drug, and Cosmetic Act are published pursuant to 21 U. S. C. 375(a) and are judicially noted. See *Colgrove et al. v. United States*, 176 F. 2d 614, 615 footnote 1 (C. A. 9, 1949), cert. den. 338 U. S. 911; *Libby, McNeill & Libby v. United States*, 148 F. 2d 71, 73 footnote 3 (C. A. 2, 1945). Moreover, the factual background described in this part of the brief is recited in the Complaint for Injunction. [R. 5-7.] By stipulation, all of the allegations of the Complaint and its supporting affidavits are deemed true for the purposes of determining the issue now before the Court. [R. 71-72.]

convinced beyond a reasonable doubt that these hormone preparations constituted not merely a potential danger but also an actual danger to health when used indiscriminately by the lay person.² The District Court also stated that the therapeutic claims which Allen H. Parkinson had made for these products far exceeded the benefits that could be derived from them. [R. 6].

But within a month after that conviction, Allen H. Parkinson, then doing business through the Hudson Products Company, a corporation, and its wholly owned subsidiary, Maywood Pharmacal Company, a fictitious name, again launched a nationwide mail-order promotion of drugs containing methyl testosterone. While the composition and labeling of the drugs were modified, Parkinson continued to make substantially the same sexual rejuvenation claims as were the basis of the criminal action. The United States filed a Complaint for Injunction in the U. S. District Court for the Southern District of California alleging that these activities violated the Federal Food, Drug, and Cosmetic Act. The District Court at first refused to issue an injunction but this Court reversed. *United States v. El-O-Pathic Pharmacy, et. al.*, 192 F. 2d 62 (C.A. 9, 1951). [R. 6-7].

In the *El-O-Pathic* opinion, this Court made a careful appraisal of the medical evidence and took the defendants to task for their reckless and indiscriminate distribution of dangerous drugs without heed to the judicial admonition enunciated in the criminal case at the time of conviction. We quote some of the forceful language used by the

²The record of that case and the District Court's views on conviction were fully considered and discussed by this Court in a related case in which the same Allen H. Parkinson was a defendant. (*United States v. El-O-Pathic Pharmacy, et al.*, 192 F. 2d 62, 66, 76 (C. A. 9, 1951).)

Court of Appeals because it indicates Allen H. Parkinson's disregard for his fundamental responsibilities to the public as a distributor of drugs:

Pages 76-77

"The district court in the criminal cases, had found that the indiscriminate distribution or dispensation of testosterone carried not only a potential but an actual danger of injury, and that, outside a restricted class of cases, the drugs produced none of the benefits which appellees encouraged the readers to believe they would produce. If appellees accept this finding, as they claim to do, then, *for what purpose are they now distributing this dangerous drug in such an indiscriminate way and in such huge quantities?* It is plain they are selling it for uses other than set forth in the directions in the labels. Twenty-five million match cover advertisements for distribution in California alone is hardly assurance that appellees are limiting the sales of these dangerous drugs to such restricted legitimate use as was mentioned by the district court in its findings in the criminal cases, or established by the evidence in this case." [Emphasis added.]

Pages 77-78

"In the submission of their arguments, appellees leave the crucial questions in the case unanswered. If it is dangerous to take a drug except under a physician's supervision, and if the distributors of such a drug do not want persons to take it except under a physician's supervision, what objection do they have to selling it only upon the prescription of a physician? And if they do not want persons to take it except under a physician's supervision, *why do they exploit and promote such a drug, so restricted in its usefulness, by indiscriminate, widespread appeal directly to the public, offering customers sales in bargain lots*

when, as a result of such methods, it is most unlikely that physicians will be consulted by such customers? The failure and inability to give any adequate answers to these questions have transcendent significance.” [Emphasis added.]

The pointed observations of this Court, implemented by the injunction subsequently issued by the District Court, did not convince Allen H. Parkinson that he should abandon further exploitation of sex rejuvenation drugs; they simply impressed him with the desirability of substituting an innocuous drug for methyl testosterone.

Commencing the latter part of 1952 and until halted by a temporary restraining order issued in this case in February of 1954, the Parkinson brothers initiated a series of mail-order promotions involving essentially inert drugs flamboyantly promoted for sexual rejuvenation. [R. 7-15; note also Exhibits 1-19 attached to the Complaint for Injunction].³ In the order of their appearance on the market these drugs were “Vita-Glan Male Formula,” “Bio-Glan Male Formula” and “Adler’s Compound,” and they are the foundation of the present suit. Typical of all the drugs but even more extravagant than the others was the latest, the “Adler’s Compound” promotion.

The drug which defendants-appellees designated “Adler’s Compound” consisted of tablets manufactured for them in Los Angeles in large quantities—200,000 at a time. [R. 19]. A bottle of 60 of these tablets, which defendants sold for \$10, cost approximately twenty-five cents wholesale. [R. 19]. Defendants sold this drug in two “strengths”

³By Stipulation, these Exhibits were not printed because of their length and character but they are part of the record on appeal and may be considered in their original form. [R. 91-92.]

—Standard Strength and Super Strength. [See labels, Exhibit 6 attached to Complaint for Injunction]. The same tablets supplied both “strengths,” the only difference being that the Super Strength product was recommended in twice the daily dosage of the Standard Strength. [R. 11; Exhibit 6 attached to Complaint for Injunction].

The prosaic composition [R. 11] and local origin of “Adler’s Compound” might have discouraged less resourceful entrepreneurs from thinking that with this product they could overcome the sales resistance of persons on their mailing lists who had already been subjected by the defendants to so many prior exploitations in the sexual rejuvenation field. [R. 5]. True, “Adler’s Compound” contained “a base or inert testicular powders, prostate substance, glandular tissues and other excipients.” [Exhibit 6 attached to Complaint for Injunction]. But this angle, preying on ignorance and superstition, had already been thoroughly explored in the earlier “Vita-Glan” and “Bio-Glan” promotions where the Parkinsons had proclaimed in bold type [Exhibits 16 and 10 attached to Complaint for Injunction]:

“Contains Most Effective Vitamins in Base of
4 GLAND SUBSTANCES

* * * * *

VITA-GLAN MALE FORMULA

is compounded of . . .

GLAND SUBSTANCES

ORCHIC SUBSTANCES

The gland substance of whole bull
testicles vacuum dried.”

* * * * *

and had added less conspicuously:

“The base gland substances are inert and perfectly safe to use and are considered by many doctors to have great psychosomatic value in male sexual weakness of non-systemic, non-organic origin.”

For “Adler’s Compound,” a different approach, a foreign flavor, was needed. With a touch of the Parkinson wand, this lowly product of Los Angeles was transformed to “a new and amazing medical miracle” “from out of post-war Germany” which would enable the purchaser “to be a man among men and to satisfy and thrill the woman of his choice, to live again the joys that only a complete sex life can bring.” [Exhibit 2 attached to Complaint for Injunction]. A German pharmaceutical manufacturer, Konrad Adler & Company, was created out of whole cloth complete with German address, German bank reference, European Sales Offices in Paris and Rome and London, and with a “licensed distributor” in the United States, which happened to be Glandular Products Company at Long Beach, one of the fictitious names under which the Parkinson brothers operated. [Exhibit 2 attached to Complaint.]

Since a photograph of the non-existent Konrad Adler would have persuasive sales value, that too was supplied through a distinguished-looking picture which had been posed in 1941 by a professional Hollywood model, one James Carlisle. [Compare photograph, R. 32, attached to affidavit of Dick Whittington, R. 30-31, with photograph on Exhibits 3, 4, and 6 attached to Complaint; see also R. 11].

The promotional literature was prepared in Los Angeles using Gothic type to simulate German print, together with a slogan in German and a coat of arms. [R. 19; Exhibits

2-6 attached to Complaint]. In addition, 150,000 mailing envelopes and 150,000 airmail business reply envelopes were printed in Los Angeles. [R. 19; Exhibits 1 and 5 attached to Complaint]. All of this material was shipped from Los Angeles to London where the envelopes were postmarked "London," the British stamps were cancelled, and the promotional material was sent to potential customers in the United States whose names were on mailing lists maintained by the Parkinsons. [R. 19, 5, 9; Exhibits 1-5 attached to Complaint.] "Adler's Compound" was offered with a guarantee of satisfaction in 24 hours or your money back⁴ [Exhibits 2 and 4 attached to Complaint.]

⁴The money-back guarantee, though it has its legitimate uses, is also a common phenomenon in the sales promotion of quack remedies. See *Bradley v. United States*, 264 Fed. 79, 80 (C. A. 5, 1920); *United States v. 50¾ Dozen Bottles . . . Sulfa-Seb*, 54 F. Supp. 759, 761 (W. D. Mo., 1944). The guarantee furthers the fraudulent scheme by inspiring confidence and increasing sales. In *Harris v. Rosenberger*, 145 Fed. 449 (C. A. 8, 1906), cert. den. 203 U. S. 591, defendants marketed "new whiskey" under a money-back guaranty as whiskey 9-14 years old. In upholding a postal fraud order, the Court said at page 455:

"The falsity of the representations and the appellee's knowledge of their falsity being established, as they were, it was not an inadmissible view that *the promise to refund the purchase price, if the goods were not satisfactory and were returned, was cleverly devised to give apparent color and support to the representations*. True, it appeared that, in a few exceptional instances where customers discovered and resented the deceit which was practiced upon them, the appellee refunded the purchase price in fulfillment of his promise, but it cannot be said that this necessarily or conclusively disproved any intent to defraud, particularly when it was not questioned that in all other instances he retained the money obtained by means of the deceit which he was practicing. [Emphasis added.]

See also:

United States v. Sylvanus, 192 F. 2d 96, 105 (C. A. 7, 1951), cert. den. 342 U. S. 943;

[Footnote continued on page 11]

In response to this mail-order solicitation, defendants received and filled hundreds of orders per week for "Adler's Compound" ranging in amount from \$10 for the one-month treatment of "Standard Strength" to \$35 for the three-month treatment of "Super Strength"—until stopped by the District Court's Temporary Restraining Order. [R. 19-20, 34-36; Exhibit 4 attached to Complaint].

As is conceded in this appeal, "Adler's Compound," like its predecessors "Bio-Glan Male Formula" and "Vita-Glan Male Formula" had no value in the treatment of male sexual weakness or impotence. [Note also R. 20-23 (affidavit of pharmacologist); 24-26 (affidavit of urologist); R. 26-29 (affidavit of psychiatrist)]. All of these drugs were misbranded in numerous respects in violation of 21

[Footnote 4, continued from page 10]

Farley v. Heininger, 105 F. 2d 79, 84 (Apps. D. C., 1939), cert. den. 308 U. S. 587;

Cf. Jeffries v. Olsen, 121 F. Supp. 463, 473 (S. D. Cal., 1954).

Though apparently evidence of good faith, the money-back guarantee is in reality an integral part of the deception in a promotion such as "Adler's Compound". Since the drug is admittedly ineffective, defendants could not have hoped to profit except for the well-recognized propensity of most retail purchasers to refrain from acting upon the guarantee and seeking a refund. Moreover, defendants could count on especially few requests for refund here where there is a psychological barrier to such a request, implicit as it would be with the admission of impotence not overcome.

The validity of the "guarantee" of "Adler's Compound" is not an issue here but, in passing, we call attention to some of its mirage-like features. [See Exhibit 4 attached to the Complaint.] *Who is the guarantor?* The non-existent Konrad Adler? James Carlisle, the Hollywood model, who in 1941 had posed before a professional photographer for the photograph which was reproduced in Exhibit 4, who beyond question had never heard of "Adler's Compound", and who in fact died on February 3, 1954? [R. 30-33.] Glandular Products Company, which was not a legal entity but merely a fictitious business name acting under a "licensed arrangement" with the non-existent Konrad Adler & Company? [R. 7.]

U.S.C. 352(a), as specified in paragraphs (15), (17), and 19 of the Complaint.⁵ [R. 10-14].

This, in brief, is the factual setting out of which the present action arose. Manifestly, the defendants had engaged in deliberate, systematic, and long continued violations of the Federal Food, Drug, and Cosmetic Act. Prior enforcement actions had simply inspired the defendants to greater ingenuity in frustrating the purposes of the Act.

For these reasons, the Government was impelled to file a Complaint for Injunction in this case seeking both a statutory injunction and an order of restitution—the injunction, to halt further violations; and the order of restitution, to restore the *status quo* by returning to the purchasers the funds of which they had been defrauded, thereby making enforcement of the statute meaningful to the defendants and to the public. Restitution would prevent unjust enrichment and, insofar as possible, would put the defendants and their defrauded customers in the position they would have occupied had there been no violation of the Act.

⁵The perennial dream of a fountain of youth and the readiness of the unscrupulous to exploit that dream have long been responsible for promotions of remedies to regain “lost manhood”. For a thoughtful discussion of this problem arising out of the vending of “Organo tablets” and “Vitality pills” in a setting similar to that now before this Court, see *Leach v. Carlisle*, 267 Fed. 61 (C. A. 7, 1920), aff’d 258 U. S. 138 (1922); *Missouri Drug Co. v. Wyman*, 129 Fed. 623 (C. C. E. D., Mo., 1904).

III.

QUESTION PRESENTED

Does the District Court have discretionary power, ancillary to its jurisdiction to grant injunctive relief under 21 U.S.C. 332(a), to compel a defendant who has sold drugs in violation of the Federal Food, Drug, and Cosmetic Act, to tender a refund of the purchase money to customers who have bought those drugs?

IV.

PERTINENT STATUTORY PROVISIONS

21 U.S.C. 332. Injunction Proceedings—

(a) *Jurisdiction of Courts—*

The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown, and subject to the provisions of section 381 (relating to notice to opposite party) of Title 28, as amended, to restrain violations of section 331 of this title, except paragraphs (e), (f) and (h)-(j) of said section.

(b) *Violation of injunction*

In case of violation of an injunction or restraining order issued under this section, which also constitutes a violation of this chapter, trial shall be by the court, or, upon demand of the accused, by a jury. Such trial shall be conducted in accordance with the practice and procedure applicable in the case of proceedings subject to the provisions of section 387 of Title 28.

21 U.S.C. 331. Prohibited acts

The following acts and the causing thereof are hereby prohibited:

- (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

21 U.S.C. 352. Misbranded drugs and devices

A drug or device shall be deemed to be misbranded—

- (a) If its labeling is false or misleading in any particular.

V.

SUMMARY OF ARGUMENT

A. The Equitable Power of the District Court.

A statutory injunction proceeding is an equitable proceeding, regardless of whether the statute uses the term "equity."

A district court which is vested with power to issue a statutory injunction may exercise all of the powers of a court of equity unless there is a clear legislative restriction.

A statutory injunction suit under the Federal Food, Drug, and Cosmetic Act is a suit in equity and calls for the exercise of powers which are peculiarly those of a court of equity. This is confirmed by court decisions and the legislative history of the statute.

The equity jurisdiction of a federal district court encompasses a tremendous inherent power to see that justice is done in any equity case which is properly before the court. An equity court is not bound by the strict rules of common law but can mold its decrees to do justice amid all the vicissitudes and intricacies of life.

Restitution has long been one of the most potent remedies utilized by a Court of Chancery. Decisions in a number of significant cases have recognized the principle that issuance of a restitution order for the benefit of private persons is within the discretion of the District Court in statutory injunction suits brought by the Government.

B. The Rent and Price Control Cases.

These cases establish the principle that a statutory injunction suit to restrain the doing of prohibited acts is an equitable proceeding in which the district court may also order restitution unless the statute declares otherwise. Such inherent power may be exercised by that court, whether or not there is legislative affirmation of the power, as long as there is no legislative prohibition.

This Court has recognized that an order of restitution may be considered an equitable adjunct to a statutory injunction under the inherent equity powers of the court, and that nothing is more clearly a part of equity than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunction relief. "Such is the very essence of justice."

C. The Fair Labor Standards Cases.

The Fair Labor Standards Act and the Federal Food, Drug, and Cosmetic Act were enacted on the same day with almost identical statutory provisions for injunctive relief.

A series of cases under the Fair Labor Standards Act have ruled that restitution of back pay could be ordered as an adjunct to a statutory injunction which required the rehiring of a discharged employee.

One troublesome aspect of these cases was the existence of a statutory proceeding whereby employees could sue for back pay in their own right. An order or restitution in an injunction suit brought by the Government would not necessarily preclude a private suit by the employee, thereby subjecting the employer to the possibility of having to make good the back pay twice.

Congress then amended the Fair Labor Standards Act to set up two express statutory procedures for the collection of back pay: one to be brought by the Administrator on behalf of the employee, and the other to be brought by the employee himself. These procedures are mutually exclusive and preclude double litigation for the same back pay. Congress also provided that restitution should not be granted in an injunction suit, but only through the other procedures.

Restitution under that Act was thereby removed from the realm of equitable discretion and given status as an action at law where judgment for back pay is mandatory if a proper showing is made. Congress did not reject the principle of restitution but rather, with some qualifications, embraced it and made it an instrument of national policy.

D. The Anti-Trust Cases.

Injunction suits to restrain violations of the Sherman Act have sustained the remedy of divestiture which is analogous to that of restitution. Both remedies merely deprive a defendant of the gains from his wrongful conduct. Neither remedy is a penalty.

E. Restitution as A Remedy Under the Injunction Provisions of the Federal Food, Drug, and Cosmetic Act.

Restitution is available as a remedy in an injunction suit under the Federal Food, Drug, and Cosmetic Act.

It is proper for a court in an equity proceeding to restrain the doing of a prohibited act and further to command or enjoin the doing of other acts to assure compliance with the law or in any other way to accomplish justice in the particular case.

The Federal Food, Drug, and Cosmetic Act is remedial and should be liberally construed to carry out its beneficent purposes. The legislative history of the Act reveals Congressional concern over abuses of the consumer's health and pocketbook resulting from the sale of nostrums. The law was designed to safeguard the consumer from pecuniary loss as well as from bodily harm.

The traditional equity power to order restitution may be exerted in suits under 21 U.S.C. 332(a) since the statute contains (1) no prohibition against restitution, (2) a recognition that the District Court may include provisions in an injunction decree other than the restraint of a prohibited act, and (3) no exclusive statutory procedure for the return of the purchase price to defrauded customers.

A judicial declaration that a District Court has the discretionary power to order restitution as an equitable adjunct to an injunction suit under 21 U.S.C. 332(a) would most effectively further the salutary aims of the law. It would serve as a powerful deterrent to statutory violations by removing the probability of retaining the profits of the illegal promotion and it would also vindicate private rights which at present are largely beyond self-protection.

VI.
ARGUMENT

A. The Equitable Power of the District Court

The present case is based upon Section 302(a) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 332(a)] which authorizes the district courts to restrain certain violations of 21 U.S.C. 331. This being a statutory injunction proceeding, it might be assumed that it falls within the equity jurisdiction of the district court. But a fundamental premise in the trial court's decision appears to be that this proceeding is not in equity.

The lower court cites the injunction provisions of the Sherman Act where the district attorneys are authorized "to institute proceedings *in equity* to prevent and restrain such violations." [R. 81.] Such language, the lower court observed, "clearly empowers the district court with all the remedies of equity." [R. 81.] Since the injunction provision of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 332(a)] does not mention the word "equity," the trial court concluded that a suit under this provision does not empower the district court with all the remedies of equity [R. 76]:

"We start with the axiomatic premise that the district court is one of limited jurisdiction, and has only the power and the jurisdiction spelled out in the statutory enactments of Congress. We exclude from consideration the general equity power of the court called into play in a diversity suit, and *also exclude those situations in which, by statute, the Congress has expressly provided that the court may exercise all the powers of a court of equity.*" [Emphasis added.]

But "a suit for an injunction is an equitable proceeding." *Wilson v. Shaw*, 204 U. S. 24, 31 (1907); Story, *Com-*

mentaries on Equity Jurisprudence (14th Ed., 1918), Vol. 2, §1184, p. 553.

Nor do the courts draw a distinction between statutory and non-statutory injunction suits, or between statutes which use the term "equity" and those which do not. The statutory provision for injunctive relief under the Fair Labor Standards Act says nothing of equity [29 U.S.C. 217], but suits thereunder have been consistently treated as within the full "equitable cognizance of the court." *Mitchell v. Chambers Construction Co.*, 214 F. 2d 515, 517 C. A. 10, 1954); *Tobin v. Abelson*, 103 F. Supp. 404 (E. D. Tenn., 1951); *Tobin v. Pirchesky*, 101 F. Supp. 484, 485 (W. D. Penn, 1951); *McComb v. Frank Scerbo & Sons*, 177 F. 2d 137, 138-139 (C. A. 2, 1949); *Walling v. O'Grady*, 146 F. 2d 422, 423 (C. A. 2, 1949).

Similarly, the provision for injunctive relief under the Emergency Price Control Act said nothing of equity but this did not preclude exercise of the traditional flexible historic power of the Chancellor to do equity. *Hecht Co. v. Bowles*, 321 U. S. 321, 329-330 (1944); *Porter v. Warner Holding Co.*, 328 U. S. 395, 397-398 (1946); *Porter v. Lux*, 157 F. 2d 756, 757 (C. A. 9, 1946). When a court's equity jurisdiction is invoked, it may utilize all of its equity powers unless there is a clear legislative restriction. Thus, in the *Warner Holding* case, the Supreme Court stated, 328 U. S. at page 398:

"Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."

While the Federal Rules of Civil Procedure abolished all distinctions as to forms in the federal courts between

actions at law and suits in equity, "the difference in substance in federal judicial power between law and equity is embedded in the Constitution and remains unaltered." *Commercial National Bank in Shreveport v. Parsons*, 144 F. 2d 231, 240-241 (C. A. 5, 1944), cert. den. 323 U. S. 796; U. S. Constitution, Art III, Sections 1 and 2. See also *Stainback v. Mo Hock Ke Lok Po*, 336 U. S. 368, 382 footnote 26 (1949).

A case arising under a federal law authorizing a representative suit to enforce liability of shareholders of a Bank, "concerns not only a federally-created right but a federal right for which the sole remedy is in equity," *Holmberg v. Armbrecht*, 327 U. S. 392, 395 (1946), because it "requires the exercise of powers which are peculiarly those of a court of equity." *Russell v. Todd*, 309 U. S. 280, 285 (1940). And in the *Holmberg* case, the Court added at page 395:

"We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights."

The Supreme Court agreed to review the *Holmberg* case because it raised "a question of considerable importance in enforcing liability under *federal equitable enactments*" [327 U. S. at page 394], but the statute in that case did not use the term "equity" or "equitable." [327 U. S. at page 393, footnote 1.]

A statutory injunction suit under the Federal Food, Drug, and Cosmetic Act, we submit, is also a "remedy in

equity” since it too calls for the exercise of powers which are peculiarly those of a court of equity. Thus where a district court issued an injunction under this statute restraining a defendant from shipping any cheese in interstate commerce for a period of two years *with a right to seek modification of the injunction after the two years had elapsed* on a showing that it was then no longer using filthy milk to make its cheese, the Court of Appeals reversed, *Hygrade Food Products Corp. v. United States*, 160 F. 2d 816 (C. A. 8, 1947), saying at page 819:

“The injunctive decree should be an ambulatory one. It is executory and continuing as to its purpose and should be subject to adaptation as events may change . . . *The denial of the right to apply to the court for a modification of the judgment within a period of two years is contrary to the genius of the jurisprudence of chancery.*” [Emphasis added.]

In another case ⁶ under this statute, the trial court denied a motion for a preliminary injunction, observing:

“The granting of an injunction is discretionary and not mandatory in the case of clear violations of the law, even in cases involving the public interest brought under statutory authority. *The Hecht Co. v. Bowles*, supra. While it might be more imperative to issue an injunction in public interest where the statute directs, *yet the equities are somewhat the same as in ordinary injunction actions*, as is recognized in the case last cited.” [Emphasis added.]

The legislative history of this injunction provision confirms the view that it was intended thereby to invoke the broad

⁶*United States v. Chattanooga Bakery, Inc.* (E. D. Tenn., 1949), reported in Kleinfeld and Dunn, *Federal Food, Drug, and Cosmetic Act—Judicial and Administrative Record 1949-1950* (Commerce Clearing House, 1951) page 241, 243-244.

equitable powers of the court. Thus, in a colloquy⁷ between Senator Austin and Senator Copeland, the following was said:

“Mr. Austin. Is it not the understanding of the Senator from New York that *this remedy is an equitable one* and can be brought against a specified defendant and all other persons similarly situated, so that the scope of the injunction may be such as to afford a basis for contempt proceedings anywhere in the United States and be good against any person falling within the proscribed class of defendants?

Mr. Copeland. *Yes.*” [Emphasis added.]

In the same vein, Mr. Campbell, then Chief of the Food and Drug Administration, made the following comment⁸ in a sectional analysis of one of the bills which led to the enactment of the present law:

“The next section, section 19, to my mind is one of the most important sections in the act. It provides for the suppression of repetitious offenses. In the present circumstances there is no way by which that can be done effectively. If an article is misbranded or adulterated, the manufacturer can continue for a protracted period its production and shipment in interstate commerce because of the delay incident to the conclusion of a prosecution. Even though a conviction

⁷Congressional Record, March 9, 1937, Vol. 81, part 2, pages 2007. See also Dunn, *Federal Food, Drug, and Cosmetic Act—A Statement of its Legislative Record* (1938), p. 709. Senator Copeland was the “father” of the Federal Food, Drug, and Cosmetic Act.

⁸Hearings before a Subcommittee of the Committee on Commerce, U. S. Senate, 73rd Cong., 2nd Sess., on S. 1944 (Dec. 7 and 8, 1933), page 78. See also Dunn, *Federal Food, Drug, and Cosmetic Act—A Statement of Its Legislative Record* (1938), p. 1102.

were obtained, it would be impossible to bring the matter at issue to a definite determination without the lapse of an inordinate period. This section by expediting action and suppressing continued offenses is for the more adequate protection of the public, and *permits the consideration of the whole question on an equitable basis, because proceedings under it would be instituted in courts of equity.*" [Emphasis added]

In effect, statutes such as those now before this Court [21 U.S.C. 331 and 332(a)], define a type of public nuisance and authorize the district courts to exert their traditional equity powers to abate such nuisance. See 4 Pomeroy, *Equity Jurisprudence* (5th ed. 1941) § 1349, pages 953-955. That there is a statutory basis for the injunction is immaterial. As Pomeroy points out in § 1337 on pages 934-935:

"In the states adopting the reformed procedure, the codes contain general provisions describing the cases in which an injunction may be issued, *but these provisions do not materially alter the settled equitable jurisdiction*, except in reference to injunctions against actions or judgments at law." [Emphasis added.]

" . . . a statutory jurisdiction to grant injunctions is to be administered in the light of general equitable principles." Hart and Wechsler, *The Federal Courts and the Federal System* (University Casebook Series, 1953), p. 1132.

The equity jurisdiction of a federal district court encompasses a tremendous *inherent* power to see that justice is done in any equity case which is properly before the court. That power had its origin in the "system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the

separation of the two countries." *Atlas Life Insurance Co. v. Southern*, 306 U. S. 563, 568 (1939); *Yuba Consolidated Gold Fields v. Kilkeary*, 206 F. 2d 884, 887 (C. A. 9, 1953).

The flexibility and scope of equity power have frequently been a subject of comment. In *Brown v. Board of Education of Topeka*, 349 U. S. 294, 299 (1955), the Supreme Court directed the District Courts to supervise "the transition to a system of public education freed of racial discrimination"—one of the most important and complex social problems of our time. On page 300, the Court said:

"In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."

In *Bowen v. Hockley*, 71 F. 2d 781 (C. A. 4, 1934), the Court's ruling effectively illustrated the creative resources of equity. On page 786, the Court said:

"The fact that the statute does not provide for the protection of those receiving compensation payments and that no decision has dealt with their rights in the absence of statute, is no reason why a court of equity in undertaking the operation of the business should not safeguard their rights. *One of the glories of equity jurisprudence is that it is not bound by the strict rules of the common law, but can mold its decrees to do justice amid all the vicissitudes and intricacies of life.* The principles upon which it proceeds are eternal; but their application in a changing world will necessarily change to meet changed situations. *If relief had been granted only where precedent could be found for it, this great system would never have been de-*

veloped; and, if such a narrow view of equitable powers is adopted now, the result will be the return of the rigid and unyielding system which equity jurisprudence was designed to remedy.” [Emphasis added.]

See also, 1 Pomeroy, *Equity Jurisprudence* (5th ed. 1941) §60, page 78; *Hecht Co. v. Bowles*, 321 U. S. 321, 329 (1944).

From earliest times, restitution has been one of the most potent remedies utilized by the Court of Chancery. *Restatement of the Law of Restitution*, pages 4-10. Two of the underlying principles of restitution are declared in the *Restatement* as follows:

“Section 1. *Unjust Enrichment.*

“A person who has been unjustly enriched at the expense of another is required to make restitution to the other.”

“Section 3. *Tortious Acquisition of a Benefit.*

“A person is not permitted to profit by his own wrong at the expense of another.”

Plainly, under these ancient principles of justice, a person deprived of money through a sale of merchandise induced by fraudulent misrepresentation and made illegal by Act of Congress is seeking no new, unusual, far-reaching or unheard-of relief if he asks that the illegal transaction be set aside and his money restored to him.

In the present case, however, it is not the individual purchaser but the Government, acting on behalf of the public, which seeks restoration of the purchase money to the purchasers. Decisions in a number of significant cases have recognized the principle that issuance of a restitution

order for the benefit of private persons is within the discretion of the District Court in statutory injunction suits brought by the Government. By analogy, we believe the District Court has similar power under the injunction provisions of the Federal Food, Drug, and Cosmetic Act.

Pertinent court cases fall into two principal categories—rent and price control cases, and fair labor standards cases—with anti-trust cases as a related third category.

B. The Rent and Price Control Cases.

The leading case in this discussion and one which we believe is dispositive of the issue in this appeal is *Porter v. Warner Holding Company*, 328 U. S. 395 (1946). There the Price Administrator brought a statutory injunction suit asking that the District Court (1) restrain Warner from continuing to exceed rent ceilings, and (2) order Warner to make restitution of the excessive rents it had already collected. The District Court enjoined Warner from collecting rents in excess of legal maximums but declined to order restitution. The Court of Appeals affirmed, both Courts holding there was no jurisdiction under the statute to order restitution.

In reversing the lower courts, the Supreme Court emphasized the *inherent* powers of the United States District Courts when their equity jurisdiction is invoked. Examining the Emergency Price Control Act, the Supreme Court concluded that such Act had not impaired the traditional equity power of the court to order restitution. Because of the importance of this case here, we quote from it at some length:

Pages 397-398

“Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made

illegal by the Act and to enforce compliance with the Act. *Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.* And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake . . . Power is thereby resident in the District Court, in exercising this jurisdiction 'to do equity and to mould each decree to the necessities of the particular case.' *Hecht Co. v. Bowles*, 321 U. S. 321, 329. It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. *In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances.* Only in that way can equity do complete rather than truncated justice" [Emphasis added.]

Consequently, whenever Congress authorizes resort to the equity jurisdiction of the Courts, it concomitantly sets the stage for the application of any suitable equitable remedy *unless it clearly manifests a contrary intention.* On this point, the Supreme Court further declared:

Page 398.

"Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. *Unless a statute in so many words, or by a necessary*

and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' Brown v. Swann, 10 Pet. 407, 503 . . ." [Emphasis added.]

The conclusion drawn from this enunciation of basic equitable principles was inevitable:

Pages 398-399.

"It is readily apparent from the foregoing that a decree compelling one to disgorge profits, rents, or property acquired in violation of the Emergency Price Control Act may properly be entered by a District Court once its equity jurisdiction has been invoked under §205(a). Indeed, the language of §205(a) admits of no other conclusion."

Section 205(a) did not prohibit the issuance of a restitution order; therefore, the District Court could issue such an order in an injunction proceeding under that provision. Moreover, the language of the statute was entirely consistent with the exercise of full equitable powers though it did not use the term "equity." [See 328 U. S. at page 405, footnote 5.] Under section 205(a), the District Court was authorized to grant "a permanent or temporary injunction, restraining order, or other order."

Page 399.

"As recognized in *Hecht Co. v. Bowles* . . . the term 'other order' contemplates a remedy other than that of an injunction or restraining order, *a remedy entered in the exercise of the District Court's equitable jurisdiction.*" [Emphasis added]

Obviously, the term “other order”⁹ was tantamount to legislative acquiescence in the use of pre-existing equitable powers which an equity court could use anyway in such a proceeding, absent a statutory prohibition.

Page 400

“The legislative background of §205(a) confirms our conclusion that *the traditional equity powers of a court remain unimpaired* in a proceeding under that section *so that an order of restitution may be made.*” [Emphasis added.]

Speaking of a Senate Report which had stated regarding Section 205(a)—“Such courts are given jurisdiction to issue whatever order to enforce compliance is proper in the circumstances of each particular case”—, the Supreme Court declared.

Page 401

“The last sentence is an unmistakable *acknowledgment* that courts of equity are free to act under

⁹A later case, *United States v. Moore*, 340 U. S. 616 (1951) held that under the “other order” provision, a District Court could grant restitution in a suit brought by the Government, though there was no right to an injunction because of the termination of rent control. Thus the effect of the statute was to permit the issuance of a restitution order, not only as ancillary to the consideration of an injunction suit but also independently thereof. Speaking of the *Warner* case, *where restitution was ancillary to the injunction suit*, the Court reaffirmed the inherent equitable power to order restitution:

Page 619

“The lower courts allowed the injunction but denied restitution. This Court reversed, concluding that an order of restitution was a proper ‘other order.’ This interpretation was required to give effect to the congressional purpose to authorize *whatever order within the inherent equitable power of the District Court may be considered appropriate and necessary to enforce compliance with the act.*” [Emphasis added.]

§205(a) in such a way as to be most responsive to the statutory policy of preventing inflation.” [Emphasis added.]

Courts of equity were thus free to act as courts of equity, without legislatively-imposed restriction.

One feature of the Emergency Price Control Act caused a split in the Supreme Court. Section 205(e) authorized an aggrieved purchaser or tenant to sue for damages *on his own behalf*. In the *Warner* case, the statutory period for *such* suit had run. Nevertheless, the majority opinion declared:

Page 402, footnote 5

“. . . Nowhere, however, was there any indication that §205(e) was intended to whittle down the equitable jurisdiction recognized by §205(a) so as to preclude a suit for restitution.”

But the dissenting view was that Congress had created special remedies for recovery of damages by aggrieved individuals, and that such remedies were exclusive and inconsistent with the exercise of inherent equitable jurisdiction to order restitution. Yet, even the minority recognized the validity of the majority’s discussion regarding the inherent authority of an equity court:

Page 408

“This does not imply any restriction upon the creative resources of a court of equity. When Congress is silent in formulating remedies for rights which it has created, courts of equity are free to use these creative resources. But where Congress is explicit in the remedies it affords, . . . even courts of equity may not grant relief in disregard of the remedies specifically defined by Congress.”

Two theories were advanced by the majority of the Supreme Court to support the issuance of a restitution order:

Pages 399-400

“An order for the recovery and restitution of illegal rents may be considered a proper ‘other order’ on either of two theories:

“(1) It may be considered as *an equitable adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief . . .*

“(2) It may be considered as *an order appropriate and necessary to enforce compliance with the Act . . .* The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress . . . And it is not unreasonable for a court to conclude that such a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect to its purposes. *Future compliance may be more definitely assured if one is compelled to restore one’s illegal gains; and the statutory policy of preventing inflation is plainly advanced if prices or rents which have been collected in the past are reduced to their legal maximums.*” [Emphasis added.]

The *Warner* case, we believe, is sound authority for the proposition that the District Court *has* discretionary power to order restitution in a statutory injunction suit under the Federal Food, Drug, and Cosmetic Act unless the Act embodies a legislative mandate to the contrary. In its opinion in the instant case, however, the District Court

chose to disregard the extensive views of the Supreme Court on the inherent equitable powers of a district court when called upon to issue a statutory injunction. The District Court concluded that the *Warner* case was

“based upon the particular wording of the statute. The other ground was not necessary for the decision. Although considered as dicta, it bears great weight, nevertheless we do not believe that the holding of the Warner case should be so extended.” [R. 79.]

While we have the highest respect for the District Court, we believe that the Supreme Court’s views on the inherent equitable power of a district court to order restitution in a statutory injunction proceeding are not dicta but constitute the essential holding in the *Warner* case. Hart and Wechsler, *The Federal Courts and The Federal System* (University Casebook Series, 1953), p. 1133, speak of those views as the “main ground” of the decision. The “other order” provision of the statute was simply held to be consistent with, and an affirmation of, the district court’s power to use all traditional equitable remedies in such proceedings. Such power exists in an injunction suit, *whether or not there is legislative affirmation, as long as there is no legislative prohibition.*

We are not suggesting that the *Warner* case be extended. We do maintain that it should not be nullified.

Even before the *Warner* case, this Court recognized that the Price Control Act did not disturb “the traditional flexibility of the injunctive process” and did not modify

“the historic power of the Chancellor to do equity.” *Porter v. Lux*, 157 F. 2d 756, 757 (C. A. 9, 1946).

Later, this Court had occasion to comment on the holding in the *Warner* case, *Woods v. McCord*, 175 F. 2d 919 (C. A. 9, 1949), and the views there expressed are especially pertinent here. On page 921, this Court said of *Warner*:

“The Court there held that this section permitted an order restoring to the tenant the amount that he was illegally overcharged. This was on the basis of *either* (1) *an equitable adjunct to an injunction, i.e., under the inherent equity powers of the court*, or (2) *appropriate to enforce compliance with the Act*. It is the view of the Supreme Court and our own that *nothing is more clearly a part of equity than ‘the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief.’ Such is the very essence of justice.*” [Emphasis added.]

Clearly, this Court did not consider as a dictum the *Warner* case views on the inherent equity powers of a district court to order restitution. See also *McCoy v. Woods*, 177 F. 2d 354, 355 (C. A. 4, 1949); *Orenstein v. United States*, 191 F. 2d 184, 188-189 (C. A. 1, 1951).

C. The Fair Labor Standards Cases.

The Fair Labor Standards Act and the Federal Food, Drug, and Cosmetic Act were enacted on the same day. [June 25, 1938, 52 Stat. 1040 and 1060.] Both statutes contained provisions for equitable relief that were almost identical.¹⁰

Several appellate court cases ruled that restitution of back pay could properly be ordered as an adjunct to an injunction under Section 17 of the Fair Labor Standards Act, which required the rehiring of a discharged employee. *McComb v. Frank Scerbo & Sons*, 177 F. 2d 137, 138-139 (C. A. 2, 1949); *Walling v. O'Grady*, 146 F. 2d 422, 423 (C. A. 2, 1949). *Cf. Walling v. Miller*, 138 F. 2d 629 (C. A. 8, 1943), which held that the district court had power to embody a restitution order in a consent decree.

In these cases, as in the *Warner* case, *supra*, one obstacle in the path of restitution was a statutory provision which authorized an aggrieved employee to bring suit in

¹⁰Section 302(a) of the Federal Food, Drug, and Cosmetic Act [52 Stat. 1043]:

"The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown, and subject to the provisions of Section 17 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U. S. C. 1934 ed. title 28, sec. 381), to restrain violations of section 301, except paragraphs (e), (f), (h), (i) and (j)."

Section 17 of the Fair Labor Standards Act [52 Stat. 1069]:

"The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15."

his own right for back pay plus liquidated damages. [Section 16(b), 52 Stat. 1069.] On this point, the Court stated in the *O'Grady* case:

146 F. 2d at page 423

"The possession by the employee of a right to sue for back pay does not preclude a right of the Administrator. The latter represents not merely the employee but asserts a public interest which is promoted by requiring back pay as well as reinstatement."

In recognition of the practical limitations of an employee's right to sue on his own behalf, the Court observed:

Page 423

"It is probable that the employee could have brought an individual action for loss of wages but such an action would not furnish a remedy adequate for such cases. *The amount involved ordinarily would be small and the expenses of recovery disproportionate* and it seems more in accord with the spirit of sound labor legislation to allow the Administrator to restore all the rights of an employee in a single action instead of requiring one action for injunction and reinstatement by the Administrator and another by the employee for loss of ad interim wages." [Emphasis added.]

In the light of subsequent amendments to the Fair Labor Standards Act, which we shall discuss shortly, it is well to note that two of the Judges in the *Scerbo* case were deeply troubled by the possibility that an employee, who was the beneficiary of a restitution order issued at the instance of the Administrator under Section 17, might thereafter also have brought a suit for back pay and liquidated damages in his own name under Section 16(b). While each Judge wrote a separate opinion, all three Judges

concurred in the result—namely, that a restitution order could properly be issued in the statutory injunction suit in order to grant full relief.

The *Scerbo* case was decided on August 18, 1949. Two months later, on October 26, 1949, Congress amended the Fair Labor Standards Act. [63 Stat. 910.] By adding subsection (c) to Section 16 [21 U.S.C. 216 (c)] and by revising Section 17 [21 U.S.C. 217], Congress created a special statutory pattern designed (1) *to permit the Administrator to collect back pay on behalf of employees in an independent suit for such purpose*, and (2) to protect employers from double litigation by declaring that the employee's consent to such suit by the Administrator constitutes a waiver of the employee's statutory right to sue in his own behalf. An election is thus forced on the employee, meeting the objections voiced by the concurring Judges in the *Scerbo* case.

A special statutory remedy having been meticulously worked out to achieve restitution for the benefit of aggrieved employees, a restitution order thereafter issued ancillary to an injunction under Section 17 would have been of highly doubtful validity. *Porter v. Warner Holding Co.*, 328 U. S. 395, 398, 401-402 (1946). To leave no uncertainty, Congress changed the injunction provision explicitly to eliminate restitution as a remedy in a suit brought under *that* section:

29 U.S.C. 217

“The district courts . . . shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title: *Provided, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid over-*

time compensation or an additional equal amount as liquidated damages in such action.” [Emphasis added.]

If further explanation of the action taken by Congress is needed, it may be found in the Conference Report dated October 17, 1949, identified as H. R. Report Number 1453, 81st Congress, 1st Session. [United States Code Congressional Service, 81st Congress, 1st Session, 1949, Volume 2, pages 2241, 2251-2275.] On page 2273, the Managers on the part of the House reported as follows regarding the change in the injunction provision:

“This proviso has been inserted in Section 17 of the act in view of the provision of the conference agreement contained in section 16(c) of the Act which authorizes the Administrator in certain cases to bring suits for damages for unpaid minimum wages and overtime compensation owing to employees at the written request of such employees. *Under the conference agreement the proviso does not preclude the Administrator from joining in a single complaint causes of action arising under section 16(c) and section 17.* Nor is it intended that if the Administrator brings an action under section 16(c) he is thereby precluded from bringing an action under section 17 to restrain violations of the act. Similarly, the bringing of an injunction action under section 17 will not preclude the Administrator from also bringing in an appropriate case an action under section 16(c) . . . *The provision, however, will have the effect of reversing such decisions as McComb v. Scerbo ((C. A. 2) 17 Labor Cases No. 65, 297), in which the court included a restitution order in an injunction decree granted under section 17.”* [Emphasis added.]

Restitution was thereby removed from the realm of equitable discretion and given status as an action at law where

judgment for back pay is mandatory if a proper showing is made.

After considering the judicial and legislative developments under the Fair Labor Standards Act, the lower court in the present case concluded that such developments support the view that restitution is not a proper remedy under the Federal Food, Drug, and Cosmetic Act:

“This blunt repudiation by Congress of the asserted powers of a district court to order restitution under Fair Labor Standards Act, with its almost identical provision to that of Sec. 302(a) of the Food and Drug Act [Sec. 332(a) U.S.C.A. Title 21], is significant and convincing as far as this court is concerned.” [R. 80-81.]

Had Congress simply amended Section 17 of the Fair Labor Standards Act to prohibit restitution in an injunction suit, such legislation might perhaps have been deemed a “blunt repudiation.” But Congress went further and amended Sections 16 and 17 in such a way as not to reject the principle of restitution but rather, with some qualifications, to embrace it and make it an instrument of national policy. This, we believe, is not a repudiation.

The principal thought emerging from these considerations is that in injunction proceedings under a statute practically identical with the injunction provision in the Federal Food, Drug, and Cosmetic Act, restitution was uniformly deemed a proper remedy within the discretion of the District Court, until Congress chose to eliminate that remedy and substitute another. That Congress eventually decided upon such a course of action did not establish that the courts were in error when, theretofore, they ordered restitution. For, as the Supreme Court pointed out, the power to order restitution in an equity proceeding exists in the

district court unless and until clearly curtailed by statute. *Porter v. Warner Holding Co.*, 328 U. S. 395, 398-400 (1946).

D. The Anti-Trust Cases

Injunction suits to restrain violations of the Sherman Act have not dealt with the question of restitution but have long sustained the analogous remedy of divestiture. An equity court, enjoining a conspiracy in restraint of trade under 15 U.S.C. 4, has the *inherent* discretionary power, without benefit of an express statute, to order defendants to divest themselves of property which comprises the fruit of their illegal practices.

In *Schine Chain Theatres, Inc. v. United States*, 334 U. S. 110 (1948), the Supreme Court declared divestiture to be an equitable remedy, likening it to restitution, and approving its discretionary use to overcome the advantage which accrues to the defendant for the practical reason that he always has a headstart over the Government in his unconscionable marathon. On page 128, the Court said:

“In this type of case we start from the premise that an injunction against future violations is not adequate to protect the public interest . . . They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors. Such a course would make enforcement of the Act a futile thing unless perchance the United States moved in at the incipient stages of the unlawful project . . .

“To require divestiture of theatres unlawfully acquired is not to add to the penalties that Congress has provided in the antitrust laws. *Like restitution* it merely deprives a defendant of the gains from his

wrongful conduct. *It is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project.*" [Emphasis added.]

Again approving the remedy of divestiture, the Court said in *United States v. Paramount Pictures*, 334 U. S. 131 (1948) at page 171:

"Otherwise, there would be reward from the conspiracy through retention of its fruits. Hence the problem of the District Court does not end with enjoining continuance of the unlawful restraints nor with dissolving the combination which launched the conspiracy. Its function includes undoing what the conspiracy achieved. As we have discussed in *Schine Chain Theatres, Inc. v. United States ante*, p. 110, the requirement that the defendants restore what they unlawfully obtained is no more punishment than the familiar remedy of restitution."

Here, therefore, is recognition once more of the "creative resources" of a court of equity. It is not limited to the empty gesture of halting an activity which has already achieved its forbidden objective. If justice will best be subserved by such action, the equity court may go further and set the violator back to where he would have been had he not ventured out of bounds.

In the present case, the lower court stated as one reason for its decision that "restitution, apart from its equitable considerations, may also be considered punitive." [R. 82.] But the above quotations from both the *Schine* and the *Paramount Pictures* cases show that the Supreme Court's express view is *contra*.

E. Restitution as a Remedy Under the Injunction Provisions of the Federal Food, Drug, and Cosmetic Act.

In *Porter v. Warner Holding Co.*, 328 U. S. 395, 398 (1946), the Supreme Court declared that when a Court's equity jurisdiction is invoked, all of its inherent equitable powers are available for the proper and complete exercise of that jurisdiction, "unless otherwise provided by statute." Stated in terms of the present case, restitution is available if the statute does not affirmatively bar it.

The injunction provisions of the Federal Food, Drug, and Cosmetic Act contain two subsections:

"21 U.S.C. 332. *Injunction proceedings.*

"(a) *Jurisdiction of courts*

"The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown, and subject to the provisions of section 381 (relating to notice to opposite party) of Title 28, to restrain violations of section 331 of this title, except paragraphs (e), (f), and (h)-(j) of said section.

"(b) *Violation of Injunction*

"*In case of violation of an injunction or restraining order issued under this section, which also constitutes a violation of this chapter, trial shall be by the court, or, upon demand of the accused, by a jury. Such trial shall be conducted in accordance with the practice and procedure applicable in the case of proceedings subject to the provisions of section 387 of Title 28.*" [Emphasis added.]

This section does not prohibit the use of restitution. Moreover, as we shall demonstrate shortly, it contemplates that an injunction order issued under this section may do more

than simply “restrain violations of section 331.” The statute does not include an express “other order” provision such as appeared in the Emergency Price Control Act discussed in the *Warner* case, *supra*. Yet, when the statute is read as a whole, there is clear legislative acknowledgment of the inherent authority to issue “other orders” within the equitable discretion of a court.

All enforcement actions under the Federal Food, Drug, and Cosmetic Act, including injunction suits, are brought by and in the name of the United States. [21 U.S.C. 337.] Where a decree is entered in an injunction suit brought in the name of the United States, there is no right to a jury trial in a criminal contempt action for violation of the injunction unless such right is expressly conferred by statute. [18 U.S.C. 3691; Criminal Rule 42(b); see also *United States v. United Mine Workers of America*, 330 U. S. 258, 298 (1947).] But in 21 U.S.C. 332(b), Congress provided a *limited* right to a jury trial for violation of an injunction issued under the Federal Food, Drug, and Cosmetic Act.

Thus, where the alleged violation “*also constitutes a violation of this chapter*” (the Federal Food, Drug, and Cosmetic Act), defendant is entitled to a jury trial on demand. By the same token, the alleged violation may under some circumstances *not* constitute a violation of the Act, in which case the defendant would not be entitled to a jury trial.

Provisions in an injunction decree issued under 21 U.S.C. 332(a) may restrain the doing of certain prohibited acts enumerated in 21 U.S.C. 331—for example, the introduction of a misbranded drug into interstate commerce. Violation of such provision in the decree would also constitute a violation of the Act. However, as in any other

equity case, provisions in the injunction decree may also command or enjoin the doing of other acts to assure compliance with the law, or to implement and make effective the Court's restraint of violations, or in any other way to accomplish justice in the particular case. Violations of such ancillary provisions in the injunction decree would not entitle a defendant to a jury trial under 21 U.S.C. 332(b), since those violations would not be violations of the Act.

An example of the discretion of an equity court to adopt remedies not specified in a statute in order to facilitate enforcement of a statutory injunction appears in *United States v. Bausch & Lomb Co.*, 321 U. S. 707 (1944). That was a suit to restrain violations of the Sherman Act. The District Court issued an injunction, and included provisions which permitted representatives of the Department of Justice to have access to all records and documents of one of the defendants relating to any of the matters contained in the judgment, as well as to require written reports thereon. While the statute made no provision for such broad visitatorial powers, the Supreme Court sustained this action of the lower court, stating at page 726:

"If reasonably necessary to wipe out the illegal distribution system, we see no constitutional objection to the employment by equity of this method. In the immediately preceding paragraphs . . ., we cited important precedents of this court which uphold equity's authority to use quite drastic measures to achieve freedom from the influence of the unlawful restraint of trade. These precedents are applicable here. The test is whether or not the required action reasonably tends to dissipate the restraints and prevent evasions. Doubts are to be resolved in favor of the Government and against the conspirators.' "

The principle is well established that a court of equity under a statute enacted to protect an important public interest need not limit its decree to prohibitions, but is "bound to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival." *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 461 (1940); *United States v. Crescent Amusement Co.*, 323 U. S. 173, 189 (1944). The test is the effectuation of the statutory policy and the vindication of public rights. *United States v. Sheff*, 194 F. 2d 596, 597 (C. A. 9, 1952); *Creedon v. Randolph*, 165 F. 2d 918, 919 (C. A. 5, 1948).

Under the Federal Food, Drug, and Cosmetic Act, affirmative and mandatory provisions are commonly included in injunction decrees to facilitate enforcement or otherwise achieve the objective of the law, though not expressly authorized by statute. In this very case, Part III of the "Final Consent Judgment as to Permanent Injunction Only" requires the defendants to call the Judgment to the attention of any agent who assist in marketing the drugs in question, to obtain a written statement from such agent, to maintain a file of those statements, and to permit Government representatives to examine them. [R. 68.] Part V of the Judgment declares that only a violation of Part II shall constitute a violation of the Federal Food, Drug, and Cosmetic Act within the meaning of the contempt provisions, 21 U.S.C. 332(b). [R. 69.] Consequently, defendants would have a right to demand a jury trial for violation of the *prohibitory provisions in Part II* but would not have a right to a jury trial for violation of the *mandatory provisions in Part III*.

In another food and drug injunction suit, defendants were not only restrained from shipping adulterated cheese

in interstate commerce but were also required to take certain affirmative steps to operate under sanitary conditions, such as to make specific repairs and improvements inside the plant, and to clean up a marsh in the vicinity of the sewer plant to make it ineffective as a breeding place for flies. *United States v. Nelson Creamery Corp.* (N.D.N.Y., 1946), reported in Food Notice of Judgment No. 17522.¹¹

Thus the statutory design is plain in the light of its judicial application. Under Section 332(a), the equity court is expressly authorized to restrain the doing of certain prohibited acts. As an equity court, it may also restrain or compel the doing of any other act reasonably designed to carry out the purpose of the law.

An injunction which restrains further interstate shipments of a misbranded drug is of little benefit to purchasers who bought the drug prior to the issuance of the injunction in reliance upon the promoter's fraudulent misrepresentations. As to such purchasers, the salutary ends of the law are completely defeated unless their status quo is restored by a refund of the purchase price. Restitution is an eminently suitable remedy to bring about this restoration.

Obviously, activities such as those complained of by the Government in the present case result in the mulcting of relatively small sums from large numbers of persons who, as a practical matter, have no recourse against the defendants on their own initiative. Confronted with this situation of a frustrated public interest on the one hand, and unjust enrichment on the other, a court of equity is not helpless to right the wrong. "Courts of equity may, and

¹¹See footnote 1.

frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.” *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515, 552 (1937).

It is settled that the Federal Food, Drug, and Cosmetic Act should be construed so as best to effectuate its principal objective—broad protection of the public from adulterated or misbranded foods, drugs, devices, and cosmetics. In *Pasadena Research Laboratories v. United States*, 169 F. 2d 375 (C. A. 9, 1948), cert. den. 335 U. S. 853, the Court declared on page 379:

“The Act is remedial, and should be liberally construed so as to carry out its beneficent purposes.

“In *United States v. Dotterweich*, 320 U. S. 277, 280, 64 S.Ct. 134, 136, 88 L. Ed. 48, the Court said of this statute:

“ ‘The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words. [Cases cited.]’

“ . . . We have recently had occasion to construe this same statute and have endeavored to do so in the liberal spirit commanded by the Supreme Court. *Research Laboratories, Inc. v. United States*, 9 Cir., 167 F. 2d 410, 421. In the instant case, we do not feel disposed to depart from that same generous norm of interpretation, which we believe accords with public policy and with the spirit of the law itself.”

In *United States v. Antikamnia Chemical Co.*, 231 U. S. 654, 657 (1914), a case arising under the Food and Drugs Act of 1906, which preceded the instant legislation, the Supreme Court observed:

“The purpose of the law is the ever insistent consideration in its interpretation.” [Emphasis added.]

In *United States v. El-O-Pathic Pharmacy et. al.*, 192 F. 2d 62 (C. A. 9, 1951), this Court said at page 75:

“. . . its purpose is to protect the public, the vast multitude which includes the ignorant, the unthinking, and the credulous who, when making a purchase, do not stop to analyze.”

And in another food and drug case, *Kordel v. United States*, 335 U. S. 345, 349 (1948), the Court spoke of “the high purpose of the Act to protect consumers who under present conditions are largely unable to protect themselves in this field.”

The lower court here felt that “‘the Federal Food, Drug, and Cosmetic Act is not concerned with the payment of money. Its purpose, or as much of it as is relevant here, is to prevent misbranding; that purpose can be accomplished by a restraining order.’” [R. 82.] But protection of the “public pocketbook” is as much an aim of the statute as protection of the “public health.” See *United States v. 7 Jugs . . . Dr. Salsbury’s Rakos, etc.*, 53 F. Supp. 746, 752 (D. Minn., 1946), and cases cited therein. This is reflected in the Act’s legislative history. Thus in the final Conference Report, H. Rep. No. 2716, 75th Cong., 3d Sess., (June 11, 1938), page 22, the Committee said of this law that it was designed for the purpose of

“safeguarding the public health, preventing deceit upon the purchasing public, and for other purposes”

In H. Rep. No. 2139, 75th Cong., 3d Sess. (April 14, 1938), p. 2, the Committee on Interstate and Foreign Commerce said:

“The measure contains substantially all the features of the old law that have proved valuable in promoting honesty and fair dealing. But it amplifies and strengthens the provisions designed to safeguard the public health and prevent deception. . . .”

And in H. Rep. No. 2755, 74th Cong., 2d Sess. (May 22, 1936), pages 2 and 3, the Committee on Interstate and Foreign Commerce said:

“While the old law has been of incalculable benefit to American consumers, it contains serious loopholes and is not sufficiently broad in its scope to meet the requirements of consumer protection under modern conditions. In considering the measure the committee had before it *a host of exhibits and examples of abuses of the consumer's health and pocketbook*, against which there is now no effective restriction or no restriction at all. Among these were the following:

Worthless drugs sold for serious diseases . . .

* * * * *

Debased and cheapened foods . . .

Deceptive advertising of food, drugs, therapeutic devices, and cosmetics resulting in innumerable abuses of consumer welfare . . .

* * * * *

It (the proposed bill) merely sets up checks against the small but unscrupulous minority who have not chosen to observe the underlying principles of the old Wiley law and have taken advantage of its limitations *to mulct the public* and embarrass honest competitors.” (Emphasis added.)

Manifestly, the law's concern is to safeguard the consumer from pecuniary loss as well as from bodily harm. The law, we submit, does not have as its sole objective the abstract concept—"to prevent misbranding." [R. 82.] "The problem is a practical one of consumer protection, not dialectics." *United States v. Urbuteit*, 335 U. S. 355, 358 (1948).

We believe that the salutary aims of this law could hardly be more effectively furthered than by a judicial recognition that there is lodged in the District Court discretionary power to compel restitution in a proper case under 21 U.S.C. 332(a). Such a pronouncement would give pause to the predatory entrepreneur who contemplates a get-rich-quick scheme of relieving thousands of our citizens of relatively small individual sums of money through fraudulent promises as to the great curative or restorative power of his nostrum. It would also take cognizance of the Government's authority to seek vindication of private rights which at present are beyond self-protection because of the relatively small claims involved, and the distance between the persons who have been defrauded and the one responsible for the fraud.

Moreover, the Federal Food, Drug, and Cosmetic Act contains (1) no prohibition against restitution, (2) a recognition that the District Court may include provisions in an injunction decree other than the restraint of a prohibited act, and (3) no exclusive statutory procedure for return of the purchase price to defrauded customers. Consequently, "the traditional equity powers of a court remain

unimpaired . . . so that an order of restitution may be made." *Porter v. Warner Holding Co.*, 328 U. S. 395, 400.¹²

From an enforcement standpoint, the present case illustrates a familiar type of fraudulent promotion of drugs. Characteristically, the following elements are present:

- (a) An intensified advertising campaign conducted for a relatively short period of time and focussed upon a selected and vulnerable segment of the population.
- (b) An inexpensive and ineffective product.
- (c) A high selling price.
- (d) Dishonest and extravagant misrepresentations regarding the product.

Because the promotion is based on dishonesty and misrepresentation, the promoter cannot ordinarily expect a con-

¹²A number of law review articles have considered the question of restitution under the Federal Food, Drug, and Cosmetic, with varying conclusions.

Articles supporting the restitution theory:

Note, 4 Stan. L. Rev. 519-536 (1952).

Goodrich, *Modern Application of an Ancient Remedy*, 9 Food Drug Cosmetic L. J. 565-572 (1954).

Levine, *Restitution—A New Enforcement Sanction*, 6 Food Drug Cosmetic L. J. 503-514 (1951).

Articles opposed to the restitution theory:

Noland, *Section 302(a) of the Federal Food, Drug, and Cosmetic Act: Restitution Re-examined*, 7 Food Drug Cosmetic L. J. 373-400 (1952).

Rhyne, *Penalty Through Publicity: FDA's Restitution Gam-bit*, 7 Food Drug Cosmetic L. J. 666-680 (1952).

Williams, *If This Be Equity*, 10 Food Drug Cosmetic L. J. 92-103 (1955).

See also:

Developments in the Law—The Federal Food, Drug, and Cosmetic Act, 67 Harv. L. Rev. 632, 718-720 (1954).

tinuing income to be derived from re-orders of the product. Unless the promotion can be expanded to attract new customers, the promoter must intensify his efforts to achieve the maximum sales volume within a short period of time. As returns diminish, he turns his attention to a new scheme.

The profit incentive is so great that it minimizes the deterring effect of the express statutory remedies. A person about to engage upon a promotion of this kind takes a calculated risk. What, in his judgment, are the hazards which might serve to deter him? Seizure action [under 21 U.S.C. 334(a)] against the offending goods will usually not result because interstate shipments are widely dispersed and are made in a large number of small quantities. Criminal action [under 21 U.S.C. 333] may result in a fine and jail sentence, but the fine however substantial is but a license fee compared to the profits, and the jail sentence—if one is imposed—is usually suspended in cases of this kind. Injunction action [under 21 U.S.C. 332(a)] requires such extensive investigational and preparatory work that a promotion may well have run its cycle by the time a Complaint and supporting affidavits are filed. Even in this case, where the Government was able to act with unusual rapidity, about a month elapsed between the inception of the "Adler's Compound" promotion and the issuance of a Temporary Restraining Order. During that time, a substantial number of mailings of the product took place at a price of \$10 to \$35 per mailing. [R. 19-20.]

Against this type of violation, restitution would serve as a powerful deterrent because it would remove the probability of retaining the profits. We submit that the full remedial resources of our system of jurisprudence should be utilized to eradicate evils such as the one in question.

VII.
CONCLUSION.

The District Court has the discretionary power to order restitution in this case. The lower Court's decision should be reversed and the case remanded with instructions that the court below exercise its discretion and determine whether it should order restitution and, if so, upon what terms.

Respectfully submitted,

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No. 15032

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

WAYNE A. PARKINSON, an individual Trading and Doing
Business as GLANDULAR PRODUCTS COMPANY, and
ALLEN H. PARKINSON, an Individual Trading and
Doing Business as TIDE MAILING SERVICE, and
MARGARET M. WILLIS,

Appellees.

APPELLEES' BRIEF.

FILED

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JUN 20 1956

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

PAGE

I.

Preliminary statement	1
-----------------------------	---

II.

Summary of argument.....	7
--------------------------	---

III.

Argument	9
A. The issue before this court is strictly a question of jurisdiction	9
B. The equitable power to order restitution in an appropriate case has no application in injunction proceedings under the Federal Food, Drug and Cosmetic Act.....	15
C. The rent and Price control cases.....	24
D. The Fair Labor Standards cases.....	28
E. The antitrust cases.....	32

IV.

Conclusion	34
------------------	----

ii.

TABLE OF AUTHORITIES CITED

CASES	PAGE
Arnson v. Murphy, 109 U. S. 238.....	19
Bowles v. Warner Holding Co., 60 Fed. Supp. 513.....	26
Briggs v. U. S. Machinery Company, 239 U. S. 48.....	21
Dewey v. United States, 178 U. S. 510.....	11
Farmers' and Mechanics' National Bank v. Dearing, 91 U. S. 29	19
Fourth National Bank v. Francklyn, 120 U. S. 747.....	19
Globe Newspaper Co. v. Walker, 210 U. S. 356.....	19
Hecht Co. v. Bowles, 321 U. S. 321.....	24, 25, 26
Hygrade Food Products Corporation v. United States, 160 F. 2d 816.....	17
McComb v. Frank Scerbo & Sons, 177 F. 2d 137.....	28
McComb v. Jacksonville Paper Co., 336 U. S. 187.....	28
Northern Securities Co. v. United States, 193 U. S. 197.....	33
Pearsall v. Great Northern Railway, 161 U. S. 646.....	33
Pollard v. Bailey, 87 U. S. 520.....	18
Porter v. Warner Holding Co., 328 U. S. 395.....	21, 24, 25, 26, 27
Sixty-two Cases of Jam v. United States, 340 U. S. 593.....	20, 34
Trade Commission v. Bunte Bros., 312 U. S. 349.....	20
United States v. Cowley Pharmaceuticals, Inc., No. 7369 (D. Mass., 1948)	6
United States v. El-O-Pathic Pharmacy, et al., No. 10-266- HW (S. D. Calif., May 22, 1950).....	10
United States v. Moore, 340 U. S. 616.....	27
United States v. Paramount Pictures, 334 U. S. 131.....	33
Walling v. O'Grady, 146 F. 2d 422.....	28
Watkins, Ex parte, 7 Peters 568, 32 U. S. 568.....	11

STATUTES

PAGE

Emergency Price Control Act of 1942 (56 Stat. 23, 33).....	24
Emergency Price Control Act, Sec. 205(a).....	21, 24, 25, 27
Fair Labor Standards Act, Sec. 16(c).....	29, 30, 31
Fair Labor Standards Act, Sec. 17.....	8, 28, 29, 30
Federal Food, Drug and Cosmetic Act:	
Sec. 301	4
Sec. 301(a)	4
Sec. 301(b)	4
Sec. 301(d)	5
Sec. 301(c)	4
Sec. 301(g)	5
Sec. 301(k)	5
Sec. 301(l)	5
Sec. 301(m)	5
Sec. 301(n)	5
Sec. 302	7, 17
Sec. 302(a).....	2, 4, 5, 8, 14, 15, 16, 17, 22, 23, 24, 28
Sec. 404	5
Sec. 407(b)	6
Sec. 407(c)	6
Sec. 505	5
Housing and Rent Act of 1947, Sec. 206(b) (61 Stat. 199)....	24, 27
United States Code, Title 7, Sec. 292.....	18
United States Code, Title 15, Sec. 1116.....	18
United States Code, Title 21, Sec. 332(a).....	2
United States Code, Title 21, Sec. 347(b).....	6
United States Code, Title 29, Sec. 216(c).....	31
United States Code, Title 29, Sec. 217.....	28
United States Code, Title 50, App., Sec. 925(a).....	24
United States Code, Title 50, App., Sec. 1896(b).....	24
United States Constitution, Art. III, Sec. 2, Cl. 1.....	17

iv.

MISCELLANEOUS	PAGE
Congressional Record (Aug. 8, 1949), p. 11217.....	29
6 Food, Drug, Cosmetic Law Journal (1951), pp. 503-514, Levine, Restitution—A New Enforcement Sanction.....	13
6 Food, Drug and Cosmetic Law Journal (July, 1951), p. 515, Buckley, Injunction Proceedings.....	23
7 Food, Drug, Cosmetic Law Journal (1952), pp. 56, 65-67, Lev, The Nutrilite Consent Decree.....	13
7 Food, Drug, Cosmetic Law Journal (1952), pp. 373-400, Noland, Section 302(a) of the Federal Food, Drug and Cos- metic Act: Restitution Re-examined.....	13
7 Food, Drug, Cosmetic Law Journal (1952), pp. 666-680, Rhyne, Penalty Through Publicity: FDA's Restitution Gam- bit	13
7 Food, Drug, Cosmetic Law Journal (1952), pp. 674-676, Rhyne, Penalty Through Publicity: FDA's Restitution Gam- bit	14, 17
9 Food, Drug, Cosmetic Law Journal (1954), pp. 565-572, Goodrich, Modern Application of an Ancient Remedy.....	13, 35
10 Food, Drug and Cosmetic P. Journal (Feb., 1955), p. 92, Williams, If This Be Equity.....	14, 35
67 Harvard Law Review (1954), pp. 632, 718-720, Develop- ments in the Law—The Federal Food, Drug and Cosmetic Act	13, 14
House Report No. 1453, 81st Cong., 1st Sess.....	29
Kleinfeld and Dunn, Federal Food, Drug and Cosmetic Act (1938-1949), pp. 473, 474.....	6
4 Stanford Law Review (1952), pp. 519-536, Note.....	14
Senate Report No. 931, 77th Cong., 2d Sess., p. 10.....	25

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Appellees.

APPELLEES' BRIEF.

I.

PRELIMINARY STATEMENT.

The single issue to be determined is stated in paragraph 2(a) of the Stipulation and Order approved by the District Court on November 5, 1954 [R. 71]:

“Does the District Court in this case have discretionary power, ancillary to its jurisdiction to grant injunctive relief under 21 U. S. C. 332(a), to compel a defendant who has sold drugs in violation of the Federal Food, Drug and Cosmetic Act, to tender a refund of the purchase money to customers who have bought those drugs?”

The single statutory provision involved is Section 302(a) of the Federal Food, Drug and Cosmetic Act (21 U. S. C. 332(a)):

“The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown, and subject to the provisions of section 381 (relating to notice to opposite party) of Title 28, as amended, to restrain violations of section 331 of this title except paragraphs (e), (f) and (h)-(j).

The statutory reference hereinafter made to the Federal Food, Drug and Cosmetic Act will be to the sections of that Act, rather than to the sections of the U. S. Code.

If the Court does not have the power under the terms of this statutory provision to compel the tender of a refund of the purchase money to customers who have bought articles sold in violation of the Federal Food, Drugs and Cosmetics Act, the power does not exist.

Although the issue before this Court is stated in the Stipulation and Order referred to, nevertheless, it is essential that it be defined even more precisely so that it may be placed and considered in its proper perspective.

Although the issue here is phrased in terms of “discretionary” power to compel refunds, there is nothing discretionary about the power itself. If this legal power or authority exists, it exists without regard to the discretion of any Court. *Only its exercise may properly be termed discretionary.* And this, under the terms of para-

graph 2(b) of the Stipulation and Order [R. 71] was specifically reserved to the District Court for subsequent consideration in this case if—and only if—the power itself was first found to exist. The District Court found that the power did not exist. In its opinion that Court said, in part:

“Restitution, apart from its equitable considerations may also be considered punitive. It is a further method of punishing a defendant in that it requires him to pay over monies in his possession to others. There is a line of authorities that ‘an injunction is primarily a preventive remedy; it looks to the future rather than to the past. It is not for the purpose of punishing for wrongful acts already committed.’ *Hygrade Food Products Corp. v. United States* (8 Cir. 1947) 160 F. 2d 816, and cases cited at page 819; *Minneapolis & St. Louis Ry. Co. v. Pacific Gamble Robinson Co.* (8 Cir. 1950) 181 F. 2d 812 at 814; *American Chicle Co. v. Topps Chewing Gum* (2 Cir. 1954) 210 F. 2d 680 at 683. We conclude that the remedy of restitution is not within the powers of the district court under the statute. The Food, Drug and Cosmetic Act has provided the sanctions of (1) criminal prosecution and punishment of violators (21 U. S. C. A., Sec. 333), (2) seizure of goods shipped in violation of the Act (21 U. S. C., Sec. 334(a)), and (3) injunctions against further violations (21 U. S. C. A., Sec. 332(a)). There is no indication in Congressional history that supports any other sanction or specifically the power to order restitution under the Food, Drug and Cosmetic Act. The contrary was true in the Congressional history of the Emergency Price Control Act.

“The government’s arguments that such power in a district court are necessary to effect the essential objectives of the Act and to protect the public’s pocketbook should be addressed to Congress, not to a district court. The jurisdiction and power of this court stem not from things necessary or desirable, but from Congressional action.” [R. 82-83.]

Put another way, if the Court has this power, it has it in all cases where violations may be restrained and not only in certain cases, nor only “in this case,” although the issue, as stated, naturally refers to the case at bar. This must be recognized if the full scope and impact of the issue before this Court is to be clearly understood. Thus, for example, although we are here dealing with drugs, all foods, devices and cosmetics having interstate relations are equally affected, for the Court has the same jurisdiction “to restrain violations” affecting these as it has with respect to drugs.

Moreover, although here the specific violation alleged relates to misbranding, if the power exists to command refunds, it must also exist with respect to every other violation of Section 301 which could be restrained under Section 302(a).

By Section 301(a), (b) and (c) the adulteration of any food, drug, device or cosmetic is prohibited, and hence the introduction of any such article into interstate commerce or delivery for receipt in interstate commerce may be restrained and under the Government’s theory, refunds ordered.

Under Section 404, the Secretary of Health, Education and Welfare is given certain emergency permit authority over foods; Section 505 establishes a procedure controlling the shipment of new drugs in interstate commerce. Since Section 301(d) prohibits the violation of these sections such violations may also be restrained, and would also fall within the scope of the Government's theory authorizing the court to compel refunds to purchasers.

Section 301(g) prohibits the *manufacture* within any Territory of any food, drug, device or cosmetic that is adulterated or misbranded. Since such manufacture may be restrained, refunds here could also be ordered if the Government's position were correct. Violation of Section 301(k), (l), (m) and (n) may also be restrained under Section 302(a). It is worth noting what some of these prohibitive acts are, for they make plain the broad sweep and ambit of the proposition which the Government seeks here to establish.

For example, Section 301(l) prohibits the use in any advertisement or labeling relating to any drug, any representation or suggestion that a new drug application is effective, or that a drug complies with the provisions of the new drug section. This is prohibited even if true. Refunds could be ordered to all purchasers of such drugs under the Government's view. An even more startling result could arise under Section 301(m), once the power to compel refunds is found to exist. That section prohibits the sale or offering for sale of colored margarine

or the possession or serving of colored margarine, unless the margarine is packaged in retail packages of one pound or less, the lettering of the word "margarine" on the package is of the appropriate size and all the ingredients are stated on the package. (21 U. S. C. 347(b).) So far as sales in public eating places are concerned, a violation occurs if margarine in a form ready for serving is found at such establishment unless an appropriate sign appears on the premises where it may be readily seen, or on the menu, and unless each separate serving bears or is accompanied by labeling identifying it as margarine and is triangular in shape. (Sec. 407(b) and (c).)

These provisions—and not all of them have been detailed here—serve to emphasize what the Government is seeking in the instant litigation. For once the principle is established that the power "to restrain violations" includes the power to compel refunds, then the power would exist not only in cases such as the one at bar, but for example, in cases where margarine is sold in a square rather than in a triangular shape, or where some reference is made in the advertising of a new drug that an application therefor is effective, or where the alleged violation is technical, unintentional and inadvertent.¹

¹See, e.g., *United States v. Cowley Pharmaceuticals, Inc.*, No. 7369 (D. Mass., 1948), Kleinfeld and Dunn, *Federal Food, Drugs, and Cosmetic Act*, 1938-1949, p. 473 at 474: ". . . the Act is sufficiently broad to allow the issuance of an injunction even though no wilfulness or knowledge on the part of the respondent or its agents is shown."

II.

SUMMARY OF ARGUMENT.

A. The Issue Before This Court Is Strictly a Question of Jurisdiction.

The issue before this court being one of jurisdiction, is strictly a legal issue and does not depend in any degree upon the underlying facts, "factual background" or the merits of this proceeding. Hence the "factual background" of the Government's prayer for restitution (App. Br. pp. 4-12) is wholly irrelevant to a consideration of the question, and the issue before this court.

B. The Equitable Power to Order Restitution in an Appropriate Case Has No Application in Injunction Proceedings, Under the Federal Food, Drug and Cosmetic Act.

The equitable powers of the District Court, in exercising the power conferred by Congress under Section 302 of the Federal Food, Drug and Cosmetic Act, are limited by the grant of jurisdiction. Traditional equitable powers may be employed by Federal Courts only where it appears that Congress intended them to have such powers. No such intention can be derived either from the long legislative history of the Federal Food, Drug and Cosmetic Act, or under any reasonable construction of its language.

C. The Rent and Price Control Cases.

The rent and price control analogy is in fact no analogy at all. The statutes involved in the rent and price control cases were far more expansive in their grant of jurisdiction than in the grant conferred by Section 302 of the Food, Drug and Cosmetic Act. Those statutes conferred upon the administrator the right to apply to the appropriate court "* * * for an order enjoining such acts

or practices, or for an order enforcing compliance with such provisions, and upon a showing by the administrator that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, *or other order*, shall be granted without bond.” (Italics added.) Under Section 302a of the Food, Drug and Cosmetic Act, the power conferred upon the court is limited solely “to restrain violations.”

D. The Fair Labor Standards Cases.

The Fair Labor Standards Act cases likewise present no analogy helpful in the present case. Although some Appellate Court cases held that under that Act restitution of back pay could properly be ordered as an adjunct to an injunction, under Section 17 of that Act, the Supreme Court never ruled upon the question, but left it open. Congress, concerned with the Appellate Court’s interpretation of Section 17, amended it to provide in express terms that restitution was *not* authorized under it, thus bluntly repudiating the *asserted* powers of a District Court to order restitution under the Fair Labor Standards Act, with its almost identical provisions to that of Section 302a of the Food, Drug and Cosmetic Act.

E. The Antitrust Cases.

The antitrust divestiture analogy employed by the Government is likewise of no assistance. Divestiture is not restitution, as the Government uses that term here. Divestiture requires the defendant to sell his offending interest or stock or properties or to divest himself of his holdings. He is deprived of the offending property *at a price*. He is not required to restore anything either to his competitor or to any member of the business who may have been injured by his monopolistic practices.

III.
ARGUMENT.

A. The Issue Before This Court Is Strictly
a Question of Jurisdiction.

The single issue now before this Court is a strictly legal one. It does not depend in any degree upon the underlying facts or merits of the instant proceeding. That there is presented here solely a question of law, of statutory authority and jurisdiction, is made clear by the Stipulation and Order approved by this court on November 5, 1954 [R. 71]. Not only is this accomplished by the statement of the issue itself in paragraph 2(a), but it is underlined by paragraph 2(b) and particularly by paragraph 5 of that Stipulation and Order which declares that *only* if that issue is first resolved in favor of the Government would the next issue then arise, namely, whether an order compelling refunds ought to issue in the instant case. To that end paragraph 5 provides that the parties would *then* bring "all facts pertinent to that issue before the Court as expeditiously as possible."

Yet the Government, in its Brief (App. Br. pp. 4-12), has in a lengthy tirade against these defendants, sought to inject factual matters, in an apparent effort to inflame and prejudice the Court against these particular defendants, and thus obtain a favorable decision on the issue of law under consideration. Thus, even in the "Summary of Proceedings," the drugs here involved are twice referred as "nostrums." (App. Br. p. 2.) They are also referred to as "worthless sex rejuvenator drugs. (App. Br. p. 2.)

In the so-called "Factual Background"—although the Government would have to concede that the particular

facts of the alleged violation can have no bearing upon the jurisdictional issue involved—the persons purchasing the drugs are referred to as “hapless” (App. Br. p. 4) and “defrauded” (App. Br. p. 12), and previous legal difficulties of the defendants are described in what is apparently intended to be lurid detail. Not only are these previous legal difficulties detailed by the Government in its brief, although they have no pertinence whatever to the existence or non-existence of the power to compel refunds, but the defendants are throughout referred to in the most derogatory terms. While thus presumably giving the “factual background”² of the instant proceeding, the Government has gone far afield in the use of adjectives and expressions openly aimed at incensing the Court against these defendants to such a degree that the Court would determine the legal issue involved—which would affect thousands of later defendants in entirely different circumstances—in favor of the Government. It has no other relevance and can have no other purpose.

²The “factual background” as presented by the Government does not do so fairly. It neglects to inform the court that Judge Metzger who heard the 1949 case against Allen H. Parkinson, without a jury, only fined him \$100 per count thus reflecting his feeling that this defendant’s violation was relatively minor in character and not remotely as serious or dangerous to health as the Government would have this Court believe. The Government also glosses over the fact that this Court (Judge Westover), after trial, refused to grant the injunction sought in September, 1949, finding that with the revised labelling there was no violation of the Food, Drug, and Cosmetic Act in the marketing of these drugs. While this decision was later reversed by the Court of Appeals, the fact that this Court found and held as it did certainly demonstrates that the conduct of Allen H. Parkinson in that situation as well was not as black as the Government now seeks to paint it. (*United States v. El-O-Pathic Pharmacy, et al.*, No. 10-266-HW (S. D. Calif., May 22, 1950).

The stipulation and order *re* restitution reserved to the defendants "the right to object to the consideration by the court of any facts alleged in the complaint appearing in any other documents or exhibits, on the ground that they are irrelevant, or should not be considered by the court in deciding the issues stated in par. 2(a) [R. 72].

Such "facts" can only be relevant if jurisdiction exists in the court to order restitution. Such "facts" are dependent entirely upon the existence of jurisdiction, and then come into play (if jurisdiction existed) for the purpose of enabling the court, in its discretion, to determine whether restitution, under those facts, should be considered. Therefore, the question of jurisdiction is solely a question of law, not dependent upon any extraneous circumstances.

As stated by Mr. Justice Story, in the early case of *Ex parte Watkins*, 7 Peters 568, 32 U. S. 568, 572 (1833):

"But the jurisdiction of the court can never depend upon its decision upon the merits of a case brought before it, but upon its right to hear and decide it at all."

In *Dewey v. United States*, 178 U. S. 510, 521 (1899) Mr. Justice Harlan said:

"Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the Government, so to depart from sound rules of construction, as in effect to adjudge that to be law which Congress has not enacted as such."

Therefore, the so-called "facts" alleged in the Government's brief are completely irrelevant on the subject of

whether this court has jurisdiction to do that which the Government seeks—order restitution.

The vital inquiry, however, is why the Government felt it necessary to make this deliberate attempt to sway the Court emotionally on a question of law, a question which depends entirely upon statutory interpretation rather than upon the alleged conduct or misconduct of any particular defendants. We submit that the reason that the Government felt compelled to take this approach is that the Government's position and argument on the present issue is comparable to a huge inverted pyramid with its entire structure and content teetering precariously on the simple statutory language "to restrain violations," attempted to be supported and bolstered by "analogies" drawn from unrelated cases, in unrelated fields, based on unrelated statutes.

There is no decision under the Federal Food, Drug, and Cosmetic Act which sanctions the remedy sought here by the Government, nor even hints that it exists. There is nothing—not a single syllable—in the entire legislative history of this statute which was under consideration and scrutiny for 5 years, that suggests that the power to compel refunds was included in the authority "to restrain violations." There is no shred of evidence that Congress intended to grant such authority or jurisdiction, or even dreamed that such power existed under the statutory language used. Nor is there any evidence that for at least 13 years under the present Act, the Government itself ever thought, believed or claimed that such authority existed. Yet in this proceeding, the Government seeks to have this Court now discover that in addition to the arsenal of remedies so carefully and thought-

fully spelled out by Congress during years of legislative hearings and after 30 years of experience under the previous food and drug statute of 1906, there exists—and has always existed—the drastic authority to compel refunds in every situation where violations of the Act could be restrained. This, we respectfully submit, would be judicial legislation with a vengeance.

The Government's argument that there exists—and has always existed, though heretofore unsuspected—the judicial power to compel refunds in all situations in which a court could "restrain violations" under the Federal Food, Drug and Cosmetic Act, rests entirely upon certain Rent and Price Control cases, some Fair Labor Standard Act decision, divestiture in Sherman Act antitrust litigation, the so-called "inherent power" of a court of equity to grant "restitution," and the alleged need for this drastic remedy to "facilitate enforcement" of the Act.⁸

Many situations where the proposed remedy would be impossible, impractical or inequitable have been pointed

⁸These analogies and arguments have been analyzed and discussed pro and con in the food and drug literature during the past 3 years since restitution first appeared upon the food and drug horizon:

Rhyne, *Penalty Through Publicity: FDA's Restitution Gam-bit*, 7 Food, Drug, Cosmetic L. J. 666-680 (1952);

Noland, *Section 302(a) of the Federal Food, Drug, and Cosmetic Act: Restitution Re-examined*, 7 Food, Drug, Cosmetic L. J. 373-400 (1952);

Lev, *The Nutrilite Consent Decree*, 7 Food, Drug, Cosmetic L. J. 56, 65-67 (1952);

Developments in the Law—The Federal Food Drug, and Cosmetic Act, 67 Harv. L. Rev. 632, 718-720 (1954);

Levine, *Restitution—A New Enforcement Sanction*, 6 Food Drug, Cosmetic L. J. 503-514 (1951);

Goodrich, *Modern Application of an Ancient Remedy*, 9 Food, Drug, Cosmetic L. J. 565-572 (1954);

out.⁴ Thus, for example, how would purchasers be found or located where a food, drug, device or cosmetic has been sold nationally during the past 10 years through retail outlets and distributors rather than through mailing lists? Who would have the responsibility and who would bear the heavy cost of determining the purchasers entitled to refund? Would this impossible burden be imposed upon the manufacturer or distributor? And what proof would be necessary for an alleged purchaser to establish that he had, in fact, been a purchaser of the article? Although the impracticability and uneven or inequitable operation of a remedy—particularly an equitable one—is perhaps persuasive evidence of its non-existence and evidence that Congress did not intend it to exist, we recognize that it is not determinative of that legal issue. Hence we shall here attempt to confine ourselves to the single proposition that Section 302(a) of the Federal Food, Drug and Cosmetic Act of 1938 confers no jurisdiction to compel refunds.

Williams, *If This Be Equity*, 10 Food, Drug and Cosmetic P. J. 92 (Feb., 1955);

Note, 4 Stan. L. Rev. 519-536 (1952).

The propriety of the use of the term "restitution" in the context in which the Government here uses it has been seriously—and we believe properly—questioned. Certain fundamental elements of the equitable remedy of restitution are totally lacking as that concept is sought to be applied in the compulsory refund to all purchasers of the total purchase price regardless of value received, regardless of reliance upon any alleged misbranding, and regardless even of any fraud or deception. (Rhyne, *supra*, at pp. 674-676.)

⁴See, for example, Rhyne, *supra*, at 676; 67 Harv. L. Rev., *supra*, at 720.

B. The Equitable Power to Order Restitution in an Appropriate Case Has No Application in Injunction Proceedings Under the Federal Food, Drug and Cosmetic Act.

The Government's brief says (App. Br. p. 18) that "the fundamental premise in the trial court's decision appears to be that this proceeding is not in equity," referring to the statement in the court's opinion, which reads as follows:

"We start with the axiomatic premise that the district court is one of limited jurisdiction, and has only the power and the jurisdiction spelled out in the statutory enactments of Congress. We exclude from consideration the general equity power of the court called into play in a diversity suit, and also exclude those situations in which, by statute, the Congress has expressly provided that the court may exercise all the powers of a court of equity. We also exclude from consideration the power of a district court to compel compliance with its orders when violated or threatened to be violated (*McComb v. Jacksonville Paper Co.*, (1949), 336 U. S. 187, 193.) Sec. 332(b) 21 U. S. C. A., expressly makes reference to a violation of the injunction, and proceedings thereon." [R. 76.]

The court there simply said that the grant of jurisdiction under Section 302(a), "to restrain violations" did not likewise confer jurisdiction to "exercise *all* powers of a court of equity." (*Italics supplied.*)

Then, in support of that conclusion, the court went on to discuss the so-called analogy relied upon by the Gov-

ernment—the rent control cases, etc.; that Section 302(a) called into play all of the inherent powers of a court of equity. In conclusion the court held that these were not valid analogies. In the final analysis the basic question here is simply: Did the grant of jurisdiction conferred by Section 302(a), “to restrain violations,” also confer jurisdiction to order restitution.

The Government prefaces its entire discussion of its various statutory analogies by a dissertation on the principles governing the equitable remedy of restitution to prevent unjust enrichment. (App. Br. pp. 18-26.) We have no quarrel with what is said there regarding restitution, its potency as a remedy, or its ancient origin. It is simply without application here under the plain language of the controlling statute.

Significant, too, however, for it relates to what we have adverted to earlier, is the Government’s statement that there is nothing unusual “under these ancient principles of justice” for “a person deprived of money through a sale of merchandise induced by *fraudulent misrepresentation*” to ask that his money be restored to him. (App. Br. p. 25.) *Even if this be conceded, the power which the Government seeks this Court to find in the Food and Drug Act goes far beyond this statement.*

Not only is the power not to be found to have the Government do this on behalf of individuals, however few or many, claiming to be thus aggrieved, but if the power exists at all in the phrase “to restrain violations” it is not limited and cannot be limited to situations of alleged fraudulent misrepresentation. It would apply, as we have said, with equal force to *every* violation which can now be restrained whether it be misbranding or

adulteration, whether the violation be intentional or due to mistake, inadvertence, neglect or even natural chemical changes in the product.⁵ To limit the existence of the power in the Food and Drug Act to cases of *fraudulent misrepresentation* can only be accomplished by Congress.

Injunctions are generally classified as affirmative or negative. Section 302(a) of the Federal Food and Drug Act confers jurisdiction "to restrain violations" of nine of the fourteen subsections of Section 301 and is thus explicitly negative in character. This negative character of the injunctive power under the statute here involved was well stated in *Hygrade Food Products Corporation v. United States*, 160 F. 2d 816, 819 (C. A. 8, 1947), in language having particular pertinence here:

"The jurisdiction of the court, however, is limited to restraining violation of Section 331, and that is the introduction or delivery for introduction into interstate commerce of products that are adulterated or misbranded. An injunction is primarily a preventive remedy; it looks to the future rather than to the past. It is not for the purpose of punishing for wrongful acts already committed."

To argue, as the Government does, that a court acting under Section 302 acts as a court of equity *with the power* to utilize any or all of the traditional equitable powers including restitution, overlooks the source of federal equity jurisdiction and the sharply limiting language of Section 302 itself. The equity jurisdiction of federal courts is derived only from the Constitution (Art. III, Sec. 2, Cl. 1) and laws of the United States. Federal

⁵See, Rhyne, *supra*, at pp. 674-675.

courts may thus employ traditional equitable powers only where it appears that Congress intended them to have such powers. Such does not appear either in the long legislative history of the Food and Drug Act, or, we submit, under any reasonable construction of its language.

Where Congress had wished to confer full equitable jurisdiction it has been able to do so in unequivocal language, as in the Trade-Mark Act of 1905, as amended (15 U. S. C., Sec. 1116):

“The several courts vested with jurisdiction of civil actions arising under this chapter shall have power to grant injunctions, *according to the principles of equity*, and upon such terms as the court may deem reasonable to prevent the violation of any right of the registrant of a mark. . . .” (Emphasis supplied.)

Or in the statute authorizing producers of agricultural products to form associations where under certain conditions the District Court is given jurisdiction “to enter a decree affirming, modifying, or setting aside said order, *or enter such other decree as the court may deem equitable*. . . .” (Emphasis supplied.) (7 U. S. C., Sec. 292.)

It is a familiar legal principle that statutory remedies are exclusive; that where a statute creates a right or liability and provides its own remedy, that remedy is exclusive. Thus, for example, in *Pollard v. Bailey*, 87 U. S. 520, 527 (1874) the Supreme Court declared:

“The liability and the remedy were created by the same statute. This being so the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced by an appropriate common-law action. *But where the pro-*

vision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed.” (Emphasis supplied.)

Of many cases to the same effect, see:

Farmers’ and Mechanics’ National Bank v. Dearing, 91 U. S. 29, 35 (1875);

Fourth National Bank v. Francklyn, 120 U. S. 747, 756 (1887);

Globe Newspaper Co. v. Walker, 210 U. S. 356, 364-367 (1908).

Are the statutory remedies inadequate? Would it be desirable to add additional enforcement weapons to the existing statutory arsenal? Just as the Government does here, these questions have been put to courts many times in the past. The answer uniformly made, as it should be made here, is the only one which a court under our system can give:

“Inadequate it may be to fully protect . . . yet such as Congress has seen fit to give, and which it, not the courts, have power to enlarge by amendment of the statutes.” (*Globe Newspaper Co. v. Walker*, *supra*, at page 364.)

And:

“For any inconveniences that may result . . . it is for Congress alone to apply the needful remedy.” (*Arnson v. Murphy*, 109 U. S. 238, 243 (1883).)

Noteworthy, too, is the failure by the Government for a period of 13 years under the Food and Drug Act of 1938 to claim anywhere or in any forum the right to apply for a compulsory refund order or to assert the power of a court to grant it. It is true that non-exercise

of authority or power actually conferred by Congress does not destroy the jurisdiction given. But coupled with the absence of any express grant, and the total absence of any supporting legislative history, the complete silence of so active and so alert an agency as the Food and Drug Administration for 13 years is extremely powerful evidence of the non-existence of the claimed authority.

The Supreme Court has given weight and consideration to *negative* administrative conduct in passing upon jurisdictional questions. When the Federal Trade Commission instituted a Section 5 proceeding against an intrastate merchant on the theory that his alleged unfair methods handicapped interstate competitors, the Supreme Court in *Trade Comm'n v. Bunte Bros.*, 312 U. S. 349, 351-352 (1941), stated in language fully applicable here:

“That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.”

And as Justice Frankfurter said in *62 Cases of Jam v. United States*, 340 U. S. 593 (1951), a leading case under the Federal Food, Drug and Cosmetic Act:

“In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the

point where Congress indicated it would be stopped. . . . Indeed, the Administrator's contemporaneous construction concededly is contrary to what he now contends."

We repeat—there are no Federal Courts of Equity except to the extent of jurisdiction conferred by Congress. Such courts have no equity jurisdiction *per se*, but only the capacity to employ equitable principles, when as a prerequisite Congress has placed certain causes within the court's cognizance.

In *Briggs v. U. S. Machinery Company*, 239 U. S. 48, 50 (1915), the court said, in a memorandum opinion by Mr. Justice Van Devanter,

"* * * counsel for the plaintiff * * * endeavors to maintain the jurisdiction of the District Court by a reference to the general powers of Federal Courts, when setting as courts of equity; evidently forgetting that such powers can be exerted only in cases otherwise within the jurisdiction of those courts, as defined by Congress."

In *Porter v. Warner Holding Co.*, 328 U. S. 395 (1946), so strongly relied upon by the Government in its discussion of the so-called analogy to the rent and price control cases, and which will be more fully discussed under that heading in this brief, the court held that the order for restitution was a "proper other order" and that the inherent equitable jurisdiction "thus called into play" (p. 400) by the "other order" provision authorized restitution. Inherent equity jurisdiction is not the root of the power to order restitution. In the *Warner* case it was said, as to the power conferred by Section 205(a) of the Emergency Price Control Act, that "it is an occasion where Congress has authorized, save in one aspect, the broad equity jurisdiction that inheres in courts * * *"

(p. 403). This is judicial observance of a Congressional right to call into play as much or as little of equitable principles as it desires. Section 302(a) of the Food, Drug and Cosmetic Act calls into play only so much of the total potentialities of equity as a concept, as is necessary to restrain violations. It is submitted that the cases containing broad statements concerning the extent of the inherent powers of a court of equity involve statutes where the full equity powers of a court were conferred by Congress.

If the Government's argument is valid, then in each case in which the power to restrain violations is given, restitution could be ordered. For example, cases arising under the Federal Trade Commission Act—and countless others. In the racial discrimination cases, there was involved the right previously given by Congress to enjoin the enforcement of State statutes, violative of the Federal Constitution, thus opening the door to mandatory injunctions, and the full equity powers to effectuate decrees. In such cases, obviously, restraining the enforcement of an invalid State law would have no effect, unless the full equity powers of the court were available to effectuate the decree.

It appears to us that "the forgotten man" in this case is Congress, and what Congress intended. The basic question is whether Congress intended, by its grant of the power "to restrain violations" of the Food, Drug and Cosmetic Act, to also confer the ancillary power to order restitution. A very informative article on the legislative history of Section 302(a) is exhaustively treated in an article by John B. Buckley, Jr., a full-time instructor of law at New York University Law Center. His article is entitled "*Injunction Proceedings*" and will be found in the Federal Food, Drug and Cosmetic Law Journal, issue

of July, 1951, Volume 6, at page 515. It will be seen, from a study of this article, that never once during the five-year course of the Food, Drug and Cosmetic Act through Congress, was it contended or even mentioned that the power conferred by Section 302(a) conferred also the ancillary power to order restitution.

The Federal Food, Drug and Cosmetic Act was prepared and strenuously supported throughout its five-year journey by representatives of the Food and Drug Administration, to remedy difficulties existing in the 1906 Act. The legislative history shows that the principal argument concerning the power to restrain given by Section 302(a), had to do with the power of equity to restrain criminal acts.

It has heretofore been argued, and undoubtedly will be, that the principal object of restitution is the protection of the pocket-book of the consumer. If this is a proper objective, it could be used in every case arising under the Act, for that purpose, but the question inevitably is whether Congress at any time intended that to be the case. The legislative history of the Act, as we have said, is completely silent on the subject.

If the Government's present argument is true, there would never be a need for an "other order" provision such as we find in the rent and price control cases, but it is manifest that when Congress intended to confer upon the Court a power greater than that "to restrain" violations, they would so provide, and when they did not intend it, it was omitted. Also, if the Government's present argument is valid, the restitution could be awarded for every dollar's worth of sale of an offending product, since 1906, if a product had been known that long.

Nothing in the legislative history closely approximates any support of such a conception.

C. The Rent and Price Control Cases.

The Government's principal reliance appears to be based upon *Porter v. Warner Holding Co.*, 328 U. S. 395 (1946), a Supreme Court decision construing the jurisdictional grant of Section 205(a) of the Emergency Price Control Act of 1942. (56 Stat. 23, 33, 50 U. S. C. App., Sec. 925(a).) That section provides that the Administrator, if he believes violations have occurred or are threatened, may apply to the appropriate court:

“ . . . for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, *or other order* shall be granted without bond.” (Emphasis supplied.)

A mere reading of this broad statutory grant of authority readily discloses decisive differences between this language and the limited grant of authority given under Section 302(a) “to restrain violations.”

But Section 205(a) of the Emergency Price Control Act of 1942 (and its equivalent, Sec. 206(b) of the Housing and Rent Act of 1947)⁶ first reached the Supreme Court in *Hecht Co. v. Bowles*, 321 U. S. 321 (1944). The Administrator, finding a department store had exceeded maximum prices and failed to keep records as required by certain regulations, sought an injunction relating to these particular violations. The Supreme Court found that the court could under the statutory language involved, fashion an appropriate decree to obtain compliance (p. 328):

⁶61 Stat. 199 (1947); 50 U. S. C. App., Sec. 1896(b).

“It seems apparent on the face of section 205(a) that there is some room for the exercise of discretion on the part of the court. For the requirement is that a ‘permanent or temporary injunction, restraining order, or other order’ be granted. Though the Administrator asks for an injunction, some ‘other order’ might be more appropriate, or at least so appear to the court . . . Such an order, moreover, would seem to be a type of ‘other order’ which a faithful reading of section 205(a) would permit a court to issue in a compliance proceeding. However that may be it would seem clear that the court might deem some ‘other order’ more appropriate for the evil at hand than the one which was sought.”

The important thing to be noted in the *Hecht* case for our purposes, is that the Supreme Court based its decision that the court could issue an appropriate decree upon a “faithful reading” of the “other order” language in Section 205(a). Moreover, the Supreme Court pointed to a passage in the Act’s legislative history showing a Congressional desire to grant the courts essentially full equity powers under that statute:

“Such courts are given jurisdiction to issue whatever order to enforce compliance is proper in the circumstances of each particular case.” (S. Rep. No. 931, 77th Cong., 2d Sess., p. 10.)

Thus the later language in the opinion describing the wide powers of a court of equity are bound to the “other order” language of the statute and its legislative history which lends support to the court’s view—both of which elements are significantly lacking in the Food and Drug Act.

In the *Warner Holding Company* case, the Administrator sought to restrain rent overcharging and to require restitution of excessive rents collected in the past. Both

lower courts found they lacked jurisdiction to award restitution. The Supreme Court reversed, resting jurisdiction to issue a mandatory restitution order on precisely the same basis as in the *Hecht* case, namely, the "other order" language in the controlling statute (p. 399):

"As recognized in *Hecht Co. v. Bowles*, . . . the term 'other order' contemplates a remedy other than that of an *injunction or restraining order*, a remedy entered in the exercise of the District Court's equitable discretion." (Emphasis supplied.)

The identical legislative history relied upon in the *Hecht* case is again referred to by the Supreme Court in the *Warner Holding Co.* case to reinforce its opinion (pp. 400-401). Both in the District Court (*Bowles v. Warner Holding Co.*, 60 Fed. Supp. 513, 519-520 (D. Minn., 1944)) and in his brief before the Supreme Court the Administrator's position was that restitution was authorized as an "other order" and not as an inherent equity power of the court.

The Government, in its brief in this case (pp. 26-29), understandably emphasizes and quotes extensively language from the opinion of Justice Murphy which deals generally with the broad and all-encompassing powers of a court of equity, but the decision itself rests squarely upon the "other order" language of the statute. All other discussion regarding equitable powers follows and is dependent upon the statutory grant of such powers to the court under the "other order" language of the Price Control Act. This language, and thus such broad grant of authority, is absent in the Food and Drug Act.

If further evidence were necessary as to the basis of the *Warner Holding Co.* decision, and that it rests upon the vital "other order" language of that statute, it may

be found in the later Supreme Court decision of *United States v. Moore*, 340 U. S. 616 (1951).⁷ There, in referring to its decision in the *Warner Holding Co.* case, the Court declared (pp. 619-620):

"This Court reversed, concluding that an order of restitution was a proper 'other order.' This interpretation was required to give effect to the congressional purpose to authorize whatever order within the inherent equitable power of the District Court may be considered appropriate and necessary to enforce compliance with the Act. . . .

Adhering to the broad ground of interpretation of the 'other orders' provision adopted in the Warner case, we think the order for restitution entered by the District Court in this action was permissible under Section 206(b)." (Emphasis supplied.)

Certainly, when the decisions are examined, the Government can find little, if any, support for its position in the Rent and Price Control cases.⁸

⁷Under Section 206(b) of the Housing and Rent Act of 1947, as amended, which contains the same "other order" language found in Section 205(a) of the Emergency Price Control Act of 1942, which was the section involved in the *Warner Holding Co.* case.

⁸The fundamental differences in purpose between Rent and Price Control legislation and the Fair Labor and Standards Act on the one hand and the Federal Food, Drug, and Cosmetic Act on the other, and the effect of such differences upon the issue of restitution has been well-stated:

"The payment of prescribed sums of money is the essence and purpose of the Fair Labor Standards Act, and also of rent and price control laws. Effectuation of the policies of these laws requires the payment of proper sums. But the Federal Food, Drug, and Cosmetic Act is not concerned with payment of money. Its purpose, or as much of it as is relevant here, is to prevent misbranding; that purpose can be accomplished by a restraining order. In the Federal Food, Drug, and Cosmetic Act, therefore, the power to restrain implies no more than it expresses and there is no authority in any court to decree restitution as an incident of a decree of injunction against misbranding. There is only authority to restrain the misbranding." (Rhyne, *supra*, at p. 678.)

D. The Fair Labor Standards Cases.

The Government also relies upon some cases arising under the Fair Labor Standards Act. Prior to its amendment in 1949, Section 17 of that statute was very similar in phrasing to Section 302(a) of the Federal Food, Drug and Cosmetic Act; it gave the District Courts jurisdiction "to restrain violations" of the minimum wage and maximum hour provisions of the Act. (29 U. S. C., Sec. 217.) Various lower courts held that there was jurisdiction under Section 17 to order restitution of illegally withheld wages. The Supreme Court, however, never ruled on the question, expressly leaving the question open in *McComb v. Jacksonville Paper Co.*, 336 U. S. 187, 193 (1949).

But Congress, alarmed by the interpretation given Section 17 by such cases as *O'Grady*⁹ and *Scerbo*¹⁰ upon which the Government's argument in this field principally depends, did not leave the question open. In unmistakable terms it repudiated the cases favoring restitution and amended Section 17 to provide in express terms that restitution was not authorized under it:

"Section 17 . . . *Provided*, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action."

⁹*Walling v. O'Grady*, 146 F. 2d 422 (C. A. 2, 1949).

¹⁰*McComb v. Frank Scerbo & Sons*, 177 F. 2d 137 (C. A. 2, 1949).

The House Managers' Statement of the amendments (H. R. Rep. No. 1453, 81st Cong., 1st Sess.) said of the amendments:

"This provision has been inserted in section 17 of the act in view of the provisions of the conference agreement contained in Section 16(c) authorizing the Administrator in certain cases to bring suits for damages for unpaid minimum wages . . . The provisions, however, will have the effect of reversing such decisions as *McComb v. Scerbo* . . ."

Senator Pepper's statement for the majority of Senate conferees declared:

"It is intended to deprive the courts of jurisdiction to exercise their equitable powers to order back wages in purely injunctive actions, as was done in *McComb v. Scerbo* . . ."

Rep. Lucas made a most revealing statement in the course of House debating. (Cong. Record (Aug. 8, 1949), p. 11217.) Addressing himself to a proviso to section 16(c) in another bill, to the effect that "nothing in this subsection shall affect or limit in any way the full equity jurisdiction of courts under section 17 of this Act," he asserted:

"I wondered why they put that in there, and I found out that there were a couple of decisions recently where a federal court exercised the purported equitable power to order the restitution of back wages, in an injunction suit. The Secretary of Labor wants that power set out in the law and confirmed, so he is setting out that the equity jurisdiction of the court is not to be meddled with. So you can see that they are not only taking the power to bring suit back to 1938, but they are taking the

power to bring restitution suits in the form of injunctions, *something that the Congress never intended when it originally passed this act . . .*"
(Emphasis supplied.)

The Government attempts to soften this blunt repudiation by Congress of the asserted power of restitution under the Fair Labor Standards Act by an argument which appears to be that this was done, not because of any absence of power under the prior statutory language, but because it was replaced with a section giving aggrieved employees a special statutory remedy in Section 16(c) (App. Br. p. 36).

How this tenuous line of reasoning can be squared with the blunt and unequivocal language quoted above is difficult to perceive. But an even more pertinent inquiry presents itself. In view of this history—both judicial and legislative—of so similar a provision, should the present issue not be presented to Congress rather than to this Court for determination? If the history of the Fair Labor Standards Act is any guide—and the Government apparently believes it is—the Congress would certainly be the appropriate forum for a consideration and resolution of the multitude of problems and conflicts inhering in this remedy when sought to be applied in food and drug cases.

In referring to the amendment of the Fair Labor Standards Act, the Government declares that in lieu of restitution ancillary to an injunction under Section 17 prior to amendment "a special statutory remedy" was "meticulously worked out" by Congress for the benefit of aggrieved employees (App. Br. p. 36). This cannot be accomplished by any court; it must and can only find that the remedy does or does not exist. Yet the Government

has made no approach to Congress to obtain express restitution jurisdiction for the courts nor to obtain any other special statutory remedy for purchasers of foods, drugs, devices and cosmetics marketed in violation of the Federal Food, Drug and Cosmetic Act. Despite the experience with the Fair Labor Standards Act which is delineated in detail in its brief, it seemingly prefers to attempt to repeat that experience involving long, costly, and indecisive litigation.

It is worth noting, in passing, that the authority given the Administrator under Section 16(c) to sue for back wages on behalf of employees was only conferred under carefully guarded conditions—conditions and limitations which would not exist under the Food and Drug Act, were the court to rule in accordance with the Government's contention here. One especially important qualification in the authority given the Administrator under Section 16(c) is that such back pay actions were to be governed by the 2-year statute of limitations in the 1947 Portal-to-Portal Act. (29 U. S. C., Sec. 216(c).) Obviously, no such fixed limitation could be imposed were the Government's view adopted that the power to compel refunds is ancillary to its authority "to restrain violations" under the Federal Food, Drug, and Cosmetic Act. In fact, it is possible, were the Government to prevail, that it could seek restitution for every dollar's worth of sales since 1938, where an allegedly misbranded or adulterated product has been marketed for that period of time. This, too, serves to underscore and bring into perspective the scope and sweep of the power which the Government asserts exists, and exists without benefit of further Congressional action or consideration.

E. The Antitrust Cases.

The Government next refers to divestiture under the Sherman Act as analogous to the form of restitution sought here, and argues that since it is a useful, equitable remedy there, the power to compel refunds is, or should be, equally available here. This ignores the wide differences between divestiture and a compulsory refund of all consideration received, and the basic distinctions between the statutes involved, their diverse functions, histories and purposes.

Divestiture is not restitution as the Government uses that term here. Divestiture requires the defendant to *sell* his offending interest or stock or properties; it is not taken from him. He is ultimately deprived of the offending property—at a price—but divestiture does not restore anything either to his competitor or to any member of the public who may have been injured by the defendant's monopolistic practices or activities in restraint of trade.

Stated another way, in antitrust law the equivalent of "restitution" as urged under the Food and Drug Act would be, not divestiture, but either (1) collection by the United States on behalf of the public of the amounts paid by reason of defendant's statutory violations, or, (2) the compulsory refund of such amounts, at the behest of the United States, to all of the defendant's customers. Neither of these, to our knowledge, has yet been done under the Sherman Act.

The authority to divest under the Sherman Act derives from the nature and purpose of that statute. Its aim is not only to bar the formation of conspiracies in restraint of trade and attempts to monopolize, not only to prevent the continuance of an illegal conspiracy or monopoly, but also to destroy even just the existence of the power and intent to monopolize. Thus, for example, as the Supreme Court said in the *Paramount Pictures* case:

“ . . . monopoly power, whether lawfully or unlawfully acquired, may violate section 2 of the Sherman Act though it remains unexercised . . . for as we stated in *American Tobacco Co. v. United States*, 328 U. S. 781, 809, 811, the existence of power ‘to exclude competition when it is desired to do so’ is itself a violation of section 2, provided it is coupled with the purpose or intent to exercise that power.” (*United States v. Paramount Pictures*, 334 U. S. 131, 173 (1948).)

It was early recognized by the Supreme Court that the consolidation of great corporations may result in a monopoly “against which public regulations will be but a feeble protection.” (*Pearsall v. Great Northern Railway*, 161 U. S. 646, 677 (1896).) The combination must, therefore, be broken up to effectuate the purposes of the Sherman Act. Divestiture (without restitution) is, therefore, a necessary step in the enforcement of the Sherman Act as construed by the courts. (See, for example, *Northern Securities Co. v. United States*, 193 U. S. 197 (1904).) The combination there had already been effected when the Government sued. Had it been allowed to pursue its course, as planned, the purpose of the antitrust law would have been nullified.

It is not so with the Food, Drug, and Cosmetic Act. The shipment or doing of some other act with respect to a food, drug, device, or cosmetic is effectively stopped by an injunction against such shipment or other act. The Act is not violated by the *possession* of articles, except margarine, which would be adulterated or misbranded and subject to being proceeded against, if shipped in interstate commerce. Unlike the Sherman Act, neither divestiture nor restitution is thus necessary to achieve the purpose of prohibiting shipment or other acts at which the Food and Drug Act is aimed.

IV.

CONCLUSION.

It is, of course, true that the Federal Food, Drug and Cosmetic Act is a remedial statute designed as Justice Frankfurter declared, to protect the public. But presumably, every act of Congress is aimed to protect or advance the public interest. Some statutes have wider scope and broader application than others, but fundamentally their purpose and design are and must be the same. Because the Food and Drug Act is also of this character, as the Government so strongly emphasizes (App. Br. pp. 45-52), is not ground for extending "the scope of the statute beyond the point where Congress indicated it would stop . . ." (*62 Cases of Jam v. United State, supra*). Jurisdiction of a Federal court does not depend upon public policy, need or desirability. It depends solely and only upon the grant of Congress. The alleged need or desirability of restitution to "facilitate en-

dorsement" cannot supply what is lacking in statutory power.¹¹ By every test—the language employed, its 5-year legislative history, its 13-year administrative construction—the power and jurisdiction to order compulsory refunds as the Government urges does not exist under the Food and Drug Act as now written.

If there were doubt as to whether or not such jurisdiction existed, it should, under the circumstances, be resolved against its existence. The far-reaching consequences of the judicial discovery of so drastic a remedy having application in every case where a violation could be restrained are such that the task of defining the remedy, its scope and application, and under what conditions or limitations it may be sought is one which can properly only be accomplished by Congress.

¹¹"We have been told that the question is 'whether the Government may vindicate private rights in its injunction suit'; that if it may not 'we must accept as part of our interstate distributional system the predatory entrepreneur who executes a get-rich-quick scheme of relieving thousands of our citizens of relatively small individual sums of money through fraudulent promises as to the great curative or restorative powers of his own particular nostrum' and so on. (*Goodrich, supra*, at pp. 566, 567.)

"I am not disposed to concede that we are put to this choice.

"If the existing statutory remedies are inadequate to prevent mulcting of the public in the manner described, it seems clear that the proper course is to ask Congress for legislation to meet the problem. I suggest, therefore, that the choice is *not* either to do nothing or to insist that the courts grant restitution under existing law. It is rather, it seems to me, to do nothing or to go to Congress. The Food and Drug Administration has a splendid record of obtaining effective statutory sanctions from Congress when the public interest has warranted such sanctions. There is no reason to believe that appropriate legislation could not be obtained in this instance if Congress is shown convincing evidence that a serious defect exists in present statutory enforcement machinery." (*Williams, If This Be Equity, supra*, p. 103.)

For all of the foregoing reasons, therefore, the question which this court is called upon to decide is that question stated in paragraph 2(a) of the stipulation and order of November 5, 1954 [R. 71], and we submit that the answer should be in the negative.

Respectfully submitted,

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No. 15032.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

WAYNE A. PARKINSON, an individual Trading and Doing
Business as Glandular Products Company and Dybutol
Company, and ALLEN H. PARKINSON, an Individual
Trading and Doing Business as Tide Mailing Service,
and MARGARET M. WILLIS,

Appellees.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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TOPICAL INDEX

PAGE

I.

The power to order restitution is not impaired by appellees' resourcefulness in conjuring up extreme applications of that remedy	1
--	---

II.

The issue before the court may not be decided in a legal vacuum	4
---	---

III.

The restitution power under the Fair Labor Standards Act of 1938	5
--	---

IV.

A court of equity can utilize the restitution remedy without a congressional directive	7
--	---

V.

An equity court's power to order restitution does not depend upon continuous exercise.....	12
--	----

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bruner v. United States, 343 U. S. 112.....	7
Byrd v. United States, 154 F. 2d 62.....	13
Federal Security Administrator v. Quaker Oats Co., 318 U. S. 218	13
Kordel v. United States, 335 U. S. 345.....	14, 15
McComb v. Frank Scerbo & Sons, 177 F. 2d 137.....	11, 14
Porter v. Warner Holding Co., 328 U. S. 395.....	11, 12, 14
Quaker Oats Co. v. Federal Security Administrator, 129 F. 2d 76	13
Research Laboratories, Inc. v. United States, 167 F. 2d 410, cert. den. 335 U. S. 843.....	13
Schine Chain Theatres, Inc. v. United States, 334 U. S. 110.....	8
Standard Fashion Co. v. Siegel-Cooper Co., et al., 51 N. E. 408, 157 N. Y. 60.....	3
United States v. 1851 Cartons . . . Whiting Frosted Fish, 146 F. 2d 760.....	13
United States v. Dotterweich, 320 U. S. 227.....	13
United States v. 3-7/12 Dozen Packages . . . Nu-Charme Perfected Brow Tint, 61 F. Supp. 850.....	13
United States v. Kelly, 97 Fed. 460.....	7
United States v. Mytinger & Casselberry, Inc., et al. S. D. Cal. No. 10344-BH, Oct. 23, 1950.....	15
United States v. 62 Packages . . . Marmola Prescription Tablets, 48 F. Supp. 878, aff'd 142 F. 2d 107, cert. den. 323 U. S. 731	13
United States v. Sullivan, 67 F. Supp. 192, reversed 161 F. 2d 629, reversed 332 U. S. 689.....	2, 13
United States v. Urbuteit, 335 U. S. 355.....	14
Virginian Railway Co. v. System Federation No. 40, 300 U. S. 515	3

	PAGE
Walling v. Miller, 138 F. 2d 629.....	10
Walling v. O'Grady, 146 F. 2d 422.....	11, 14
Willapoint Oysters, Inc. v. Ewing, Administrator, 174 F. 2d 676, cert. den. 338 U. S. 860.....	2

STATUTES

Act of June 25, 1938, Sec. 902(a).....	12
Act of June 25, 1939 (52 Stats. at L. 1059).....	12
Sherman Act (15 U. S. C., Sec. 4).....	8
United States Code, Title 21, Sec. 302(a).....	10
United States Code, Title 21, Sec. 321(m).....	13
United States Code, Title 21, Sec. 331.....	10
United States Code, Title 21, Sec. 332(a)....	1, 7, 10, 11, 14, 15, 16
United States Code, Title 21, Sec. 333.....	14
United States Code, Title 21, Sec. 334(a).....	14

MISCELLANEOUS

Congressional Record, August 8, 1949, pp. 10995, 10998.....	5
Congressional Record, Aug. 8, 1949, p. 11002 (81st Cong., 1st Sess.)	5
30 Corpus Juris Secundum, Sec. 113, pp. 523-526.....	10
4 Stanford Law Review (1952), pp. 519-536.....	15

No. 15032.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

WAYNE A. PARKINSON, an individual Trading and Doing Business as Glandular Products Company and Dybutol Company, and ALLEN H. PARKINSON, an Individual Trading and Doing Business as Tide Mailing Service, and MARGARET M. WILLIS,

Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

I.

The Power to Order Restitution Is Not Impaired by Appellees' Resourcefulness in Conjuring Up Extreme Applications of That Remedy.

Appellees devote several pages of their brief (pages 4-6) to a warning that restitution, once established as an ancillary power in an injunction suit under 21 U.S.C. 332(a), may be invoked in the presence of "technical and inadvertent" violations of the Federal Food, Drug, and Cosmetic Act. There are premonitory visions of a judi-

cial inundation with restitution suits based upon such offenses as the serving of colored margarine in public eating places in squares rather than in triangular shape.

This type of argument has been aptly termed "the parade of the imaginary horrors". In *United States v. Sullivan*, 332 U. S. 689, 694 (1948), the Supreme Court emphatically rejected an analogous argument in another food and drug case:

" . . . It is even prophesied that, if Section 301(k) is given the interpretation argued by the Government, it will later be applied so as to require retail merchants to label sticks of candy and sardines when removed from their containers for sale.

"The scope of the offense which Congress defined is not to be judicially narrowed as applied to drugs by envisioning extreme possible applications of its provisions which relate to food, cosmetics, and the like. *There will be opportunity enough to consider such contingencies should they ever arise.* It may be noted, however, that the Administrator of the Act is given rather broad discretion—broad enough undoubtedly to enable him to perform his duties fairly without wasting his efforts on what may be no more than technical infractions of the law." [Emphasis added.]

Clearly the Courts do not consider the executive branch of the Government to be wantonly irresponsible. See, also, *Willapoint Oysters, Inc. v. Ewing, Administrator*, 174 F. 2d 676, 696 (C. A. 9, 1949), cert. den. 338 U. S. 860. Moreover, an equity court called upon to exercise its inherent power to issue an order of restitution may always, within its discretion, refuse to issue such an order.

Nor does the jurisdictional authority of an equity court depend upon whether it will eventually grant the relief

sought. This principle was illustrated in *Standard Fashion Co. v. Siegel-Cooper Co., et al.*, 51 N. E. 408, 157 N. Y. 60 (1890). The plaintiff had brought suit for specific performance of a contract. Defendant had demurred on the ground of failure to state a cause of action. On page 410, the Court said:

“A court of equity has jurisdiction of such actions . . . A complete cause of action is . . . alleged, and the only reason for not awarding general relief to the plaintiff is that its nature is so complicated as possibly to require a multiplicity of orders by the court in its efforts to superintend the details of an extensive and peculiar business. *This fact does not deprive the court of jurisdiction, but justifies a refusal, in its sound discretion to exercise it. It is the difficulty of enforcing, not of rendering, judgment that causes it to hesitate.* Upon the facts before us, it is in the power of the court to enforce the agreement the same as in the case of railroad contracts, but the difficulties attending the enforcement are so great that the court would ordinarily refuse to undertake it, *as there is no public interest involved.*” [Emphasis added.]

Thus (1) the possibility that an equity court may eventually refuse to act does not deprive it of jurisdiction to act, and (2) an equity court is more likely to grant relief despite difficulties in enforcement where to do so would promote the public interest. See *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515, 552 (1937).

Appellees would of course prefer to have the Court focus attention upon pats of colored oleomargarine in square shapes rather than upon the extravagant and misleading representations which induced the purchase of *their* remedies.

II.

The Issue Before the Court May Not Be Decided in a Legal Vacuum.

Appellees argue (pp. 9-12) that the issue now before the Court is "a strictly legal one" entirely independent of the underlying facts and that the Government's brief was designed "to inflame and prejudice the Court" by describing the factual background "in lurid detail."

The factual background set forth in the Government's opening brief is taken from the Complaint for Injunction. [R. 3-17.] Moreover, it was agreed in paragraph (3) of the Stipulation and Order Re Issue of Restitution [R. 71-72], that for the purpose of deciding the issue now before the Court, "all of the allegations of the Complaint for Injunction, as well as the contents of and exhibits attached to the affidavits filed on behalf of the plaintiff, are true."

Appellees object to the relevance of such facts apparently because the facts do not present appellees in a very favorable light. This is hardly a valid ground for objection. After all, the facts are of appellees' own making.

It is not difficult to understand appellees' preference that the facts in this case be glossed over entirely. Yet this Court is not being asked to decide a moot legal question of academic interest, divorced from all facts. The issue has arisen out of an adversary proceeding and the Court's decision will have great significance for the litigants and for the public. Under these circumstances, we believe it was proper to present the stipulated facts to the Court forcefully and, we submit, fairly.

III.

The Restitution Power Under the Fair Labor Standards Act of 1938.

We have discussed this point in some detail in our opening brief. On page 29 of their brief, appellees quote from "a most revealing statement" made by Representative Lucas in the House of Representatives in 1949, in the course of a debate regarding proposed amendments of the Fair Labor Standards Act of 1938. In part, Representative Lucas said:

" . . . but they are taking the power to bring restitution suits in the form of injunctions, *something that the Congress never intended when it originally passed this act.* . . ." [Emphasis added.]

[Cong. Record, 81st Cong., 1st Sess., p. 11002 (Aug. 8, 1949).]

Whether Congressman Lucas was *then* (1949) speaking for the entire Congress which had enacted the Fair Labor Standards Act *in 1938* or even for the Congress which was considering amendments to that Act *in 1949*, is at least questionable. Thus on page 10995 of the Congressional Record of August 8, 1949, Congressman Sabath observed:

"I understand that the gentleman from Texas [Mr. Lucas], *who is serving his second term, is setting himself up above the Committee on Education and Labor*, and has broadly publicized the fact that he will offer the so-called Lucas bill as a substitute." (Emphasis added.)

See also page 10998, where Congressman Lesinski, the Chairman of the Committee on Education and Labor, describes unsuccessful efforts to work out an agreement with Congressman Lucas (also a member of that Com-

mittee) and makes this statement about the Lucas substitute bill in asking the House to reject it.

“The Lucas bill would remove more than 1,000,000 workers who are now covered from the protection of the wage-and-hour law. The Lucas bill will tie the minimum wage to a cost of living index—a plan which even the United States Chamber of Commerce has condemned as unsound. And finally, the Lucas bill, by its introduction of many new terms into the law will create great uncertainty which can only be settled by the Supreme Court decisions after years of litigation.”

The Lucas bill did not pass.

As we have shown in our opening brief (pp. 36-38), Congress was not “alarmed” by the appellate court decisions which ordered restitution under the Fair Labor Standards Act in injunction suits brought by the Administrator. Congress in fact agreed that the Courts should have the authority to order restitution at the instance of the Administrator and set up a special procedure for that purpose, independent of injunction suits brought by the Administrator.

On page 29 of their brief, appellees quote from a statement by Senator Pepper speaking for the majority of Senate conferees regarding the then proposed amendments to the Act, which embodied the special restitution procedure and simultaneously divested the Courts of power to order restitution *in injunction suits under that Act*. Senator Pepper declared:

“It is intended to deprive the courts of jurisdiction to exercise *their equitable powers to order back wages* in purely injunctive actions, as was done in *McComb v. Scerbo*. . . .” [Emphasis added.]

This confirms our argument that Congress recognized that federal Courts have the power to order restitution in statutory injunction suits, unless that power is expressly curtailed by statute. It is settled that Congress may deprive district courts of jurisdiction even with respect to pending cases. *Bruner v. U. S.*, 343 U. S. 112, 114-117 (1952); *U. S. v. Kelly*, 97 Fed. 460 (C. A. 9, 1899). But until Congress has expressly divested a Court of jurisdiction previously granted, the Court is free to exercise such jurisdiction.

If, as we contend, the federal district courts acquired jurisdiction under the Federal Food, Drug, and Cosmetic Act to order restitution in injunction suits brought under 21 U. S. C. 332 (a), they still have such jurisdiction since Congress has not amended that statute to withdraw such jurisdiction. The amendment of similar language in the injunction provisions of the Fair Labor Standards Act to divest the Courts of power to order restitution in statutory *injunction* suits brought under *that* statute simply strengthens our position that the power to order restitution exists under the Federal Food, Drug, and Cosmetic Act which has not been amended in this regard.

IV.

A Court of Equity Can Utilize the Restitution Remedy Without a Congressional Directive.

Throughout their brief, appellees paint a picture of well-nigh insurmountable problems that would confront a court attempting to apply the remedy of restitution in injunction suits under 21 U.S.C. 332(a). According to appellees, an equity court would flounder hopelessly in the face of such problems which, they contend, could be dealt with properly only by Congress. [Appellees' Brief, page 35.] They urge, therefore, that the present issue be presented to Congress rather than to the Courts.

This argument—"go to Congress"—is routinely made by a defendant who does not like the proposed application of a law to himself and professes to find an ambiguity or statutory defect which, he suggests, had best be resolved or remedied by Congress.

If the Court has the power to grant the relief sought here, it is not necessary to go to Congress to confirm that power. Moreover, a court of equity can mould its decree in any manner that will do complete justice to all concerned in the particular case. By the flexibility of its decree, a court of equity could in this case resolve all of the questions raised by the defendants without undue difficulty.

Appellees applaud the divestiture orders issued by equity courts in injunction suits under the Sherman Act. [Pages 32-33.] Noteworthy, however, is the failure of that statute to prescribe a procedure for affecting divestiture, or even to mention divestiture. Yet the courts have successfully carried out divestiture under the injunction provisions of the Sherman Act [15 U.S.C. 4] in factual situations far more complex than could ever be presented by restitution prayers in injunction suits under the Federal Food, Drug, and Cosmetic Act.

A case in point is *Schine Chain Theatres, Inc. v. United States*, 334 U. S. 110 (1948). On page 126, the Supreme Court discusses the divestiture provisions of the District Court's decree, thereby giving some indication of the magnitude of the problems which had to be resolved by the District Court:

"The District Court included in its decree a divestiture provision adjudging that appellant companies be 'dissolved, realigned, or reorganized in in their ownership and control so that fair competi-

tion between them and other theatres may be restored and thereafter maintained.”¹ The parties subsequently submitted various plans and after hearings the one submitted by the Department of Justice was approved with modifications. The plan does not provide for the dissolution of the Schine circuit through the separation of the several affiliated corporations . . . It keeps the circuit intact in that sense but requires Schine to sell certain theatres. The plan requires Schine to sell its interest in all but one theatre of its selection in each of 33 towns, all but two in each of four larger towns, and two of four theatres in Rochester, New York. Schine is to be divested of more than 50 of its theatres. The towns affected are over 40 out of the 70-odd in which Schine is operating . . .

“The decree also dissolves the pooling agreements. A trustee is appointed to make the sales which are ordered. Schine is prohibited from acquiring any financial interest in additional theatres, ‘except after an affirmative showing that such acquisition will not unreasonably restrain competition’ . . .”

While the Supreme Court felt that the District Court should make certain additional findings and for that reason set aside the divestiture provisions, it did not suggest that the District Court refrain from ordering divestiture because Congress had not enacted a procedure

¹In the District Court opinion, 63 Fed. Supp. 229, the lower court had indicated the mechanics by which it eventually arrived at a divestiture order.

Page 242:

“and that the determination of the question of the dissolution, re-alignment or reorganization of the parties aforesaid and the method to be employed in the accomplishment of the same *be left to be fixed by this court after further consideration with the parties.*” [Emphasis added.]

to govern divestiture. On the contrary, it manifested approval of judicial resort to the theory of divestiture, stating on page 128:

“Like restitution it [divestiture] merely deprives a defendant of the gains from his wrongful conduct. It is an *equitable remedy* designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project.” [Emphasis added.]

Appellees note in their brief on page 31 that restitution under 21 U.S.C. 332(a) would not be subject to a statute of limitations. On page 23 of their brief they assert that “if the Government’s present argument is valid, the restitution could be awarded for every dollar’s worth of sale of an offending product, since 1906, if a product had been known that long.” This is patently absurd. The ancient doctrine of laches is the equitable substitute for a statute of limitations and is based on the injustice that might result from the enforcement of stale and antiquated claims. See 30 C.J.S., §113, pages 523-526.

The statute in question, 21 U.S.C. 332(a), authorizes district courts “to restrain violations” of 21 U.S.C. 331. On page 22 of their brief, appellees state that Section 302(a)—[21 U.S.C. 332(a)]—“calls into play only so much of the total potentialities of equity as a concept, as is necessary to restrain violations.” But as Judge Woodrough said in his concurring opinion in *Walling v. Miller*, 138 F. 2d 629, 633 (C. A. 8, 1943):

“. . . I think *the powers* vested in the district courts by the Fair Labor Standards Act *to restrain violations of its provisions* include the power to enter mandatory injunctions at the instance of the Administrator requiring employers to pay up any deficiencies

they are shown to be unlawfully withholding from employees in violation of the Act at the time of the entry of decree against the employer.” [Emphasis added.]

This viewpoint—that the equitable power “to restrain violations” includes the power to order restitution—became the basis for the decisions in *Walling v. O’Grady*, 146 F. 2d 422, 423 (C. A. 2, 1944), and *McComb v. Frank Scerbo & Sons*, 177 F. 2d 137, 138, 139 (C. A. 2, 1949). Coupled with *Porter v. Warner Holding Co.*, 328 U. S. 395 (1946), they squarely support our position that Congress has already conferred upon the district courts the power to order restitution in statutory injunction suits brought under 21 U.S.C. 332(a).

Appellees concede that the statute here in question, by empowering the district courts “to restrain violations,” confers equity jurisdiction upon those courts. [Appellees’ Brief, page 22.] Their contention, however, is that such jurisdiction is limited. But the essence of the Fair Labor Standards cases and the Rent Control cases which we have previously discussed, is that where Congress vests power in the district courts to restrain acts which it has prohibited, it thereby authorizes those courts to employ all of their traditional equitable powers to effectuate that purpose and to achieve complete justice. This rule has been stated as follows:

“ . . . The comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. ‘The great prin-

ciples of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction'"

Porter v. Warner Holding Co., 328 U. S. 395, 398 (1946).

Plainly, he who would deny to an equity court the right to resort to any of the great principles of equity, has the burden of establishing an affirmative prohibition. No such prohibition appears in the Federal Food, Drug, and Cosmetic Act.

V.

An Equity Court's Power to Order Restitution Does Not Depend Upon Continuous Exercise.

Appellees contend that the absence of frequent prayers for restitution under the Federal Food, Drug and Cosmetic Act demonstrates the non-existence of the power to issue such an order. [Pages 19-21.] Appellees speak of "the complete silence of so active and so alert an agency as the Food and Drug Administration for 13 years." [Page 20.]

The Federal Food, Drug, and Cosmetic Act was approved on June 25, 1938, but pursuant to Section 902(a) it did not become effective until June 25, 1939. [52 Stat. L. 1059.] Operating with a small enforcement staff, the Food and Drug Administration has consistently given first priority to products involving danger to health. Second priority has gone to filthy products. Third priority has included economic cheats and frauds.

Effective enforcement of the Act of 1938 called for the early judicial interpretation of a number of fundamental legal questions, such as the criminal responsibility of corporate officers for adulterated drugs shipped in the name

of the corporation, *United States v. Dotterweich*, 320 U. S. 277 (1943); the scope of the danger to health provisions, *United States v. 62 Packages . . . Marmola Prescription Tablets*, 48 F. Supp. 878 (1943), aff'd 142 F. 2d 107 (C. A. 7, 1944), cert. den. 323 U. S. 731; the validity of the food standard program, *Quaker Oats Co. v. Federal Security Administrator*, 129 F. 2d 76 (C. A. 7, 1942), reversed *Federal Security Administrator v. Quaker Oats Co.*, 318 U. S. 218 (1943); the criminal responsibility of a pharmacist who dispenses prescription drugs without a prescription, *United States v. Sullivan*, 67 F. Supp. 192 (M. D. Ga., 1946), reversed 161 F. 2d 629 (C. A. 5, 1947), reversed 332 U. S. 689 (1948); the validity of regulations excluding dangerous coal tar colors from cosmetics, *United States v. 3-7/12 Dozen Packages . . . Nu-Charme Perfected Brow Tint*, 61 F. Supp. 850 (W. D. La., 1945), aff'd *Byrd v. United States*, 154 F. 2d 62 (C. A. 5, 1946); whether the Government can prevail when there is some conflict in medical opinion, *Research Laboratories, Inc. v. United States*, 167 F. 2d 410 (C. A. 9, 1948), cert. den. 335 U. S. 843; whether the Government must establish that filthy or decomposed food is also "unfit for food," *United States v. 1851 Cartons . . . Whiting Frosted Fish*, 146 F. 2d 760 (C. A. 10, 1945).

As a practical matter, before the Government could seek restitution under the Federal Food, Drug, and Cosmetic Act in an injunction suit involving misrepresentations of a nature which would justify restitution, it was necessary to establish the rule of law that literature shipped in interstate commerce separately from drugs to which it relates constitutes the "labeling" of such drugs within the meaning of 21 U.S.C. 321(m). This is because the statute declares that a drug is misbranded if

its *labeling* is false or misleading in any particular. [21 U.S.C. 352(a).] In practically every instance where restitution would be sought, including the present case, the distributor ships the literature bearing the false and misleading statements *separately* from the drug. It was not until *November 22, 1948*, that this question of law was settled favorably to the Government's viewpoint. *Kordel v. United States*, 335 U. S. 345, and *United States v. Urbuteit*, 335 U. S. 355.

In the meantime, it will be recalled that other governmental agencies were involved in litigation to determine the inherent power of an equity court to order restitution in a statutory injunction suit. While the Supreme Court on June 3, 1946, decided that such power existed, *Porter v. Warner Holding Co.*, 328 U. S. 395, both lower courts had held *contra*, 60 F. Supp. 513 (D. Minn., 1944) and 151 F. 2d 529 (C. A. 8, 1945). See also the Fair Labor Standards cases, *Walling v. O'Grady*, 146 F. 2d 422 (C. A. 2, 1944) and *McComb v. Frank Scerbo & Sons*, 177 F. 2d 137 (C. A. 2, 1949).

The Federal Food, Drug, and Cosmetic Act authorizes three different sanctions: *seizure actions* against the offending goods [21 U.S.C. 334(a)]; *criminal actions* against those who are responsible for the doing of prohibited acts [21 U.S.C. 333]; and *injunction actions* [21 U.S.C. 332(a)]. Since the effective date of the Act in 1939, there have been approximately 39,000 *seizure and criminal* actions but only 300 *injunction* suits brought under the Act. The statutory injunction is generally considered a drastic remedy which is not invoked except under impelling circumstances. Many of the injunction suits which are brought deal with violations where restitution would not be feasible. As appellees say on page 13 of

their brief, there are "many situations where the proposed remedy [restitution] would be impossible, impractical or inequitable . . ." The Government would not ask the district court to issue a futile order and would seek restitution only where it appeared practicable and equitable. A prayer for restitution would never be a form paragraph to be routinely added to Complaints for Injunction filed under 21 U.S.C. 332(a).

Less than 2 years after the *Kordel* case, *supra*, had created a proper foundation for a restitution prayer, an Amended Complaint for Injunction including such a prayer was filed in *United States v. Mytinger & Casselberry, Inc., et al.* (S. D. Calif. No. 10344-BH, October 23, 1950). Appellees' counsel here was one of the defense attorneys in that case. That suit was but a segment of extensive litigation discussed in the law review articles cited in our opening brief on page 50, footnote 12. In the final disposition of that litigation, the restitution prayer was not ruled upon.

The Government's position on restitution in that case has been the subject of considerable comment in legal and trade journals concerned with food, drug, and cosmetic regulation. In the *Note* entitled "Restitution in Food and Drug Enforcement," 4 Stan. L. Rev. 519-536 (1952), the author cites letters which the Stanford Law Review received from responsible governmental officials regarding the remedy of restitution. In footnote 85 on page 531, the following is quoted from a letter written by the Assistant General Counsel in charge of the Food and Drug Division of what is now the Department of Health, Education, and Welfare:

"A prayer for restitution in the circumstances of [the] *Mytinger & Casselberry* case seemed appro-

priate . . . As to our future policy, I can only say that where a situation similar to that case prevails, we shall again give consideration to asking for restitution.”

And in the same footnote, the following is quoted from a representative of the Department of Justice:

“In summary, I feel that the government may seek restitution in future cases where the circumstances are generally similar to those which prevailed in the *Mytinger & Casselberry* case.”

The mere expression of these views may well have deterred many promoters from making extravagant therapeutic claims. At any rate, less than 2 years later, the Government on February 26, 1954, filed the Complaint for Injunction in this case, including a prayer for restitution. The Government, we submit, has acted with reasonable circumspection and diligence in pressing its position on restitution under 21 U. S. C. 332(a). Even before enactment of the statute, the Chief of the Food and Drug Administration said² of a similar provision in one of the earlier bills:

“This section . . . permits the consideration of the whole question on an equitable basis, because proceedings under it would be instituted in courts of equity.”

This, in a sense, is the heart of the Government's case. The instant proceedings arose in a court of equity where every prayer for relief should be considered on an equitable

²See our opening brief, pages 22-23.

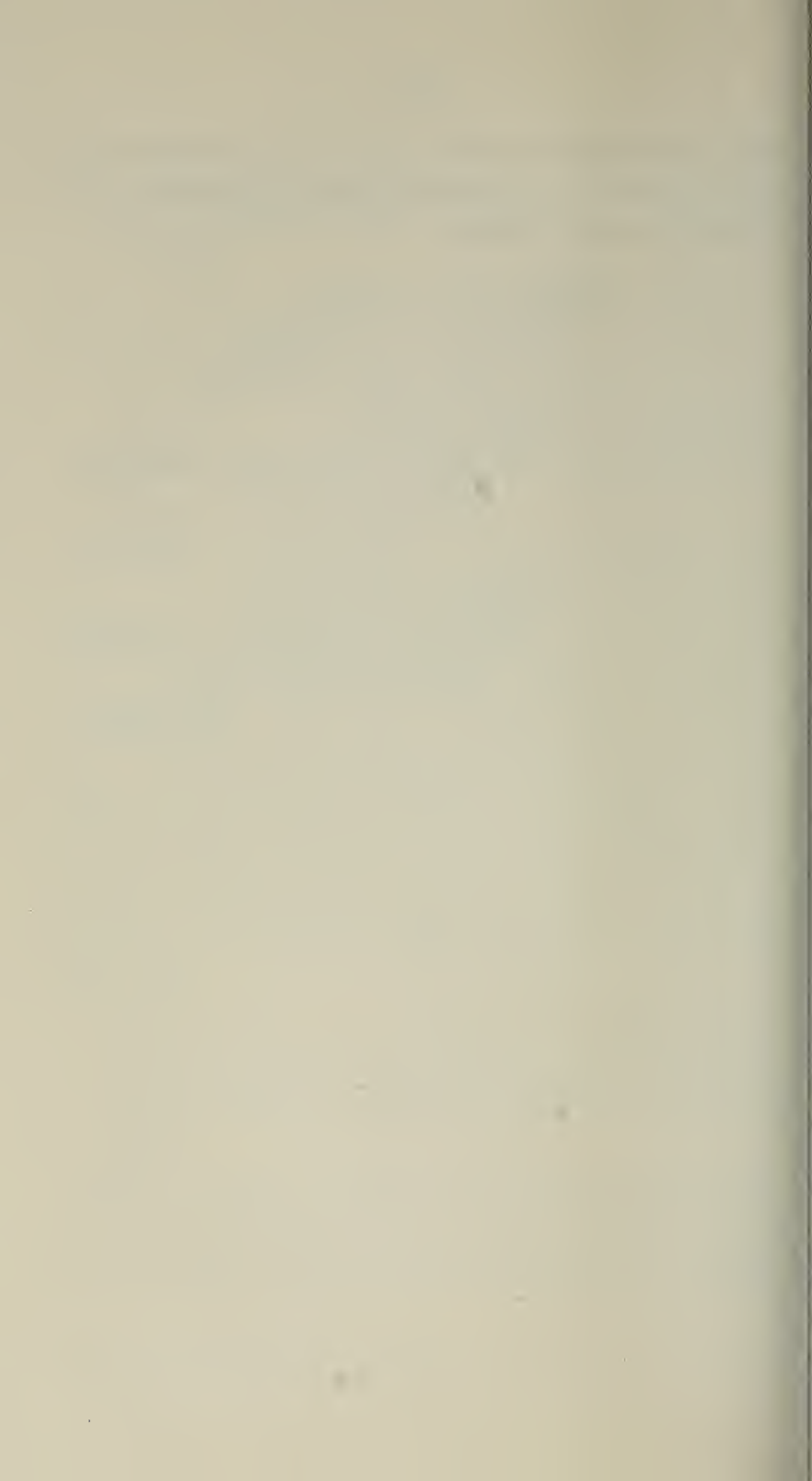
basis and where the court may, in its discretion, make full use of its broad inherent powers to accomplish a just result in the public interest.

Respectfully submitted,

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No. 15033

United States
Court of Appeals
for the Ninth Circuit

GILBERT RIPKA and WILSON BROTHERS
TRUCK LINES, INC., a Corporation,
Appellants,

vs.

CHARLES CREHORE, General Administrator of
the Estate of Herbert Noah Sanders and
Delphia F. Sanders,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

APR -9 1956

No. 15033

United States
Court of Appeals
for the Ninth Circuit

GILBERT RIPKA and WILSON BROTHERS
TRUCK LINES, INC., a Corporation,
Appellants,
vs.

CHARLES CREHORE, General Administrator of
the Estate of Herbert Noah Sanders and
Delphia F. Sanders,
Appellee.

Transcript of Record

**Appeal from the United States District Court for the
District of Arizona**

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer of Defendant Gilbert Ripka	7
Answer of Defendant Wilson Brothers Truck Lines	12
Appeal:	
Amended Designation of Record on (U.S.D.C.)	46
Bond for Costs on	43
Certificate of Clerk to Record on	439
Designation of Record on (U.S.D.C.)	45
Designation of Record on (U.S.C.A.)	446
Notice of	42
Order Extending Time to File Record on ..	47
Statement of Points on	444
Supplemental Amended Designation of Rec- ord on	47
Attorneys of Record	1
Bond for Costs on Appeal	43
Clerk's Certificate	439
Complaint (Amended)	3
Concise Statement of Points to Be Relied Upon on Appeal, Appellants'	444

INDEX

PAGE

Designation of Record on Appeal:

Filed in U.S.D.C. 45

Filed in U.S.C.A. 446

Amended (U.S.D.C.) 46

Supplemental (U.S.D.C.) 47

Docket Entry of October 10, 1955 34

Minute Entries :

August 4, 1955 17

August 5, 1955 19

August 6, 1955 21

August 8, 1955 23

October 10, 1955 33

November 7, 1955 41

December 16, 1955 42

Motion for Substitution of Plaintiff and for
Judgment Upon Verdict (Plaintiff's) 29Motion for Judgment Notwithstanding the Ver-
dict or in the Alternative for a New Trial 35

Notice of Appeal 42

Plaintiff's Request for Instruction No. 8 26

Objection to Substitution of Plaintiff and Objec-
tion to Entry of Judgment Upon Verdict 32Order Extending Time to File Record on Ap-
peal and Docket Appeal 47

Reporter's Transcript of Proceedings 48

Court's Instructions 422

Witnesses, Defendants':

Bryfogle, Roy H.

—direct	340
—cross	365, 367
—redirect	411

Cammack, Charles

—direct	328
---------------	-----

Cammack, Hazel

—direct	326
---------------	-----

Edwards, Harold F.

—direct	306
—cross	310

Mutch, Lily

—direct	330
—cross	332
—redirect	332
—recross	332

Ripka, Gilbert

—direct	411
—cross	415
—recross	416

Veazey, Young

—direct	333
—cross	337

Witnesses, Plaintiff's:

Cook, Phillip R.

—direct	184
—cross	205

Witnesses, Plaintiff's—(Continued):

Flake, Glenn

—direct	158
—cross	177
—redirect	183

Fronske, Robert Martin:

—direct	99
—cross	103, 108

Harris, Robert Russell

—direct	108
—cross	141
—redirect	154

Hurlbert, Samuel

—direct	77
—cross	97

Martinez, Sandra

—direct	290
---------------	-----

Ripka, Gilbert

—cross	223
--------------	-----

Sanders, Norma Jean

—direct	275
—cross	289

Sanders, Wanda

—direct	298
---------------	-----

Wedgeworth, Cecil Lewis

—direct	212
—cross	220

Verdict on First Cause of Action	27
--	----

Verdict on Second Cause of Action	28
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ATTORNEYS OF RECORD

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Attorneys for Appellee.

In the United States District Court
for the District of Arizona

Civil Action No. 411-Bret.

RALPH WANEK, Administrator of the Estates of
HERBERT NOAH SANDERS and DEL-
PHIA F. SANDERS, Deceased,

Plaintiff,

vs.

GILBERT RIPKA, WILSON BROTHERS
TRUCK LINES, INC., a Corporation, ROB-
ERT WILSON and BENNETT WILSON,
Individually and Doing Business as WILSON
BROTHERS TRUCK LINE, a Co-Partner-
ship, JOHN DOE ONE, JOHN DOE TWO,
JOHN DOE THREE, BLACK CORPORA-
TION, a Corporation, and WHITE CORPO-
RATION, a Corporation,

Defendants.

AMENDED COMPLAINT AND
DEMAND FOR JURY TRIAL

First Cause of Action

I.

Plaintiff herein is a citizen of the State of Arizona, and is, pursuant to and under the laws of the State of Arizona, the duly appointed, qualified and acting Administrator of the Estate of Herbert Noah Sanders, deceased, and of the Estate of Delphia F. Sanders, deceased. The defendant Gilbert Ripka, is a non-citizen of the State of Arizona, and is a citizen of the State of Indiana. The defendant,

Wilson Brothers Truck Lines, Inc., a corporation, is now and during all the times hereinafter mentioned was a corporation duly organized and existing, and plaintiff is informed and believes, and upon such information and belief alleges that said Wilson Brothers Truck Lines, Inc., is a corporation incorporated under the laws of the State of Missouri. The defendants Robert Wilson and Bennett Wilson are non-citizens of the State of Arizona, and plaintiff is informed and believes, and upon such information and belief alleges that Robert Wilson and Bennett Wilson are citizens of the State of Missouri, and are now and during all the times hereinafter mentioned, were doing business individually and as co-partners under the firm name and style of Wilson Brothers Truck Line. The defendants John Doe One, John Doe Two, John Doe Three, Black Corporation, a corporation, and White Corporation, a corporation, are parties whose true names are not now known to plaintiff, and plaintiff asks leave to insert the true names of said defendants herein by amendment when the same have been determined. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

II.

On July 10, 1954, at approximately Three o'Clock A.M., the decedent Herbert Noah Sanders and the decedent Delphia F. Sanders were riding in an automobile on a public highway called U. S. Highway 66 at a point approximately 7.5 miles west of the City of Flagstaff, in Coconino County, State of Ari-

zona. At said time and place the defendant Gilbert Ripka willfully or recklessly or negligently drove or caused to be driven a heavy truck across the center line of said U. S. Highway 66 and into the automobile then and there occupied by said decedents.

III.

At said time and place the defendant Gilbert Ripka was operating said heavy truck for and on his own behalf, and for and on behalf of the defendants Wilson Brothers Truck Line, Inc., Robert Wilson and Bennett Wilson, individually and doing business as Wilson Brothers Truck Line, a co-partnership, John Doe One, John Doe Two, John Doe Three, Black Corporation, a corporation, and White Corporation, a corporation, and as the agent, servant or employee of all the said defendants and in the course and scope of the employment of the defendant Gilbert Ripka by said defendants and by each of them.

IV.

As the direct and proximate result of the willfulness or recklessness or negligence of the defendant Gilbert Ripka, as aforesaid, the said Herbert Noah Sanders and the said Delphia F. Sanders were mortally hurt and they died.

V.

The decedent Herbert Noah Sanders was, prior to his death, an able bodied man of forty-six years of age. As a result of the willfulness or recklessness or negligence of the defendants as aforesaid, the Estate of the said Herbert Noah Sanders has been dam-

aged in the sum of One Hundred Fifty Thousand Dollars.

Wherefore, plaintiff demands judgment against the defendants in the sum of One Hundred Fifty Thousand Dollars, and costs.

Second Cause of Action

I.

Plaintiff refers to and incorporates by reference Paragraphs I, II, III and IV of the First Cause of Action.

II.

The decedent Delphia F. Sanders was, prior to her death, an able bodied woman of thirty-nine years of age, gainfully employed as a housewife. By reason of the willfulness, or recklessness or negligence of the defendants, as aforesaid, the Estate of the said Delphia F. Sanders has been damaged in the sum of Seventy-Five Thousand Dollars.

Wherefore, plaintiff demands judgment against the defendants in the sum of Seventy-Five Thousand Dollars, and costs.

MANGUM & FLICK,

By /s/ H. K. MANGUM.

LEWIS, ROCA, SCOVILLE
& BEAUCHAMP,

By /s/ HAROLD R. SCOVILLE,

J. ADRIAN PALMQUIST,
/s/ J. ADRIAN PALMQUIST,
Attorneys for Plaintiff.

Demand for Jury Trial

Plaintiff hereby demands a trial by jury of the above entitled causes.

MANGUM & FLICK,

By /s/ H. K. MANGUM.

LEWIS, ROCA, SCOVILLE
& BEAUCHAMP,

By /s/ HAROLD R. SCOVILLE,

/s/ J. ADRIAN PALMQUIST,
Attorneys for Plaintiff.

[Lodged]: Dec. 3, 1954.

[Endorsed]: Filed Dec. 17, 1954.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT GILBERT RIPKA

First Defense

I.

Defendant alleges that Herbert Noah Sanders and Delphia F. Sanders were husband and wife and that they left surviving them four children, Wilma Fern Sanders, Norma Sanders, Wanda Sanders and Linda Sanders as their sole heirs at law, and that said Herbert Noah Sanders and Delphia F. Sanders at the time of their death left no estate

or property within the State of Arizona other than the claimed action for wrongful death described in plaintiff's complaint; that Wilma Fern Sanders is a resident of the State of Pennsylvania and in any event not a resident of the State of Arizona, and that Norma Sanders, Wanda Sanders and Linda Sanders are residents and citizens of the State of California and that under the provisions of Chapter 31, A.C.A. 1939, the action sought to be prosecuted herein is one for the benefit of said Wilma Fern Sanders, Norma Sanders, Wanda Sanders and Linda Sanders and that they are the real parties in interest; and defendant therefore alleges that plaintiff is not entitled to the relief prayed for in the complaint on file herein in this jurisdiction in that no real party in interest to this suit is a resident of the district wherein the action is brought and presently pending;

Second Defense

I.

Defendant alleges he is without knowledge or information sufficient to form a belief as to the matters and things set forth in paragraph I of plaintiff's complaint.

II.

Defendant admits the allegations of paragraph II of said complaint.

III.

Defendant admits the allegations of paragraph III of said complaint.

IV.

Answering paragraph IV of said complaint, defendant admits that a collision occurred at the time and place alleged between the vehicles described; defendant denies that the driver of the 1949 Hudson sedan was driving said automobile in a careful and prudent manner at the time of the collision, alleging in this respect that the driver of said Hudson automobile operated the same in a careless and reckless manner and over the center line of said highway and onto the wrong side thereof; and defendant denies that he operated his motor vehicle at said time and place in any improper or reckless, negligent and careless fashion and denies that he drove the same over the center line of said highway and into the lane of traffic then being occupied by said Hudson automobile.

V.

Defendant admits that decedents suffered fatal injuries in the accident described, alleging in this respect that their sole negligence was the cause thereof; defendant denies all remaining allegations of paragraph V.

VI.

Answering paragraph VI, defendant alleges he is without knowledge or information sufficient to form a belief as to the matters and things therein alleged except defendant denies he was guilty of any reckless, negligent or unlawful acts or that he was in any respect responsible for the death of said Herbert Noah Sanders.

VII.

Answering paragraph VII, defendant denies the allegations thereof.

VIII.

Further answering said first cause of action, defendant denies each and every, all and singular, the allegations thereof except such thereof as have hereinbefore been expressly admitted.

Third Defense

I.

Defendant for his third defense alleges that the accident and fatal injuries of said Herbert Noah Sanders were proximately caused and contributed to by his own negligence and inattention at the time and place of the collision.

Wherefore, having fully defended against said complaint, defendant prays plaintiff take nothing thereby; for his costs; for such other and further relief as may be proper.

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Defendant.

Answer to Second Cause of Action

I.

Comes Now defendant and for his first defense to plaintiff's second cause of action incorporates herein

by reference his first defense to plaintiff's first cause of action.

II.

Defendant adopts by reference his answer to paragraphs I, II, III, IV and V of the first cause of action as incorporated in the second cause of action by reference.

III.

Answering paragraph II of the second cause of action defendant alleges he is without knowledge or information sufficient to form a belief as to the matters and things therein set forth, excepting defendant denies he was in any fashion negligent or reckless and denies he was guilty of any unlawful and wanton or other improper conduct.

IV.

Further answering said second cause of action, defendant denies each and every, all and singular, the allegations thereof except such thereof as have hereinbefore been expressly admitted.

Third Defense

I.

Defendant alleges that Delphia F. Sanders was the wife of Herbert Noah Sanders, the operator of the Hudson automobile involved in the collision; that said Herbert Noah Sanders was guilty of negligence and inattention at the time and place of the collision which caused and contributed to the fatal injuries suffered by Delphia F. Sanders and that the negligence of said Herbert Noah Sanders, being

then and there the husband of said Delphia F. Sanders, is imputed to said Delphia F. Sanders and her estate.

Wherefore, having fully defended against said complaint, defendant prays plaintiff take nothing thereby; for his costs; for such other and further relief as may be proper.

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Defendant.

Copy mailed.

[Endorsed]: Filed Aug. 2, 1954.

[Title of District Court and Cause.]

ANSWER OF WILSON BROTHERS TRUCK
LINES, INC., A CORPORATION, AND
ROBERT WILSON AND BENNETT WIL-
SON, INDIVIDUALLY AND DOING BUS-
INESS AS WILSON BROTHERS TRUCK
LINE, A CO-PARTNERSHIP, TO PLAIN-
TIF'S AMENDED COMPLAINT

Come Now Wilson Brothers Truck Lines, Inc., a corporation, and Robert Wilson and Bennett Wilson, individually and doing business as Wilson Brothers Truck Line, a co-partnership and for their answer to plaintiff's amended complaint allege as follows:

First Defense

I.

Defendants allege that Herbert Noah Sanders and Delphia F. Sanders were husband and wife and that they left surviving them four children, Wilma Fern Sanders, Norma Sanders, Wanda Sanders and Linda Sanders as their sole heirs at law and that said Herbert Noah Sanders and Delphia F. Sanders at the time of their death left no estate or property within the State of Arizona, other than the claimed action for wrongful death described in plaintiff's complaint; that Wilma Fern Sanders is a resident of the State of Pennsylvania, and in any event not a resident of the State of Arizona; and that Norma Sanders, Wanda Sanders and Linda Sanders are residents and citizens of the State of California, and that under the provisions of Chapter 31, A.C.A. 1939, the action sought to be prosecuted herein is one for the benefit of said Wilma Fern Sanders, Norma Sanders, Wanda Sanders and Linda Sanders, and that they are the real parties in interest, and defendants therefore allege that plaintiff is not entitled to the relief prayed for in the complaint on file herein in this jurisdiction in that no real party in interest to this suit is a resident of the district wherein the action is brought and presently pending.

Second Defense

I.

Answering paragraph I of plaintiff's first cause of action, these defendants are without knowledge

or information sufficient to form a belief as to the allegations pertaining to plaintiff's appointment or qualifications as acting administrator of the estate of Herbert Noah Sanders, deceased, and of the estate of Delphia F. Sanders, deceased. These defendants admit the remaining allegations therein contained, except that defendants Robert Wilson and Bennett Wilson deny that they are now doing business individually and as co-partners under the firm name and style of Wilson Brothers Truck Line.

II.

Answering paragraph II of plaintiff's first cause of action, these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

III.

Answering paragraph III of plaintiff's first cause of action, these defendants deny that said defendant Gilbert Ripka was operating said heavy truck for and on behalf of these defendants or any of them and further deny that said defendant Gilbert Ripka was at said time and place acting as the agent, servant, or employee in the course and scope of employment by these defendants or any of them.

IV.

Answering paragraph IV of plaintiff's amended complaint, these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

V.

Answering paragraph V of plaintiff's amended complaint, these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

Third Defense

Defendants for their third defense allege that the accident and fatal injuries of said Herbert Noah Sanders were proximately caused and contributed to by his own negligence and inattention at the time and place of the collision.

Wherefore, having fully defended against said first cause of action, defendants pray plaintiff take nothing thereby; for their costs; for such other and further relief as may be proper.

SNELL & WILMER,

By /s/ JAMES H. O'CONNOR,
Attorneys for Defendants.

Answer to Second Cause of Action

I.

Come Now the defendants and for their first defense to plaintiff's second cause of action incorporate herein by reference their first defense to plaintiff's first cause of action.

II.

These defendants adopt by reference their answers to paragraphs I, II, III and IV of the first

cause of action as incorporated in the second cause of action by reference.

III.

Answering paragraph II of plaintiff's second cause of action, these defendants and each of them deny that they were in anywise willful or reckless or negligent in the premises and they and each of them further deny that any act or omission on their part was the proximate cause of any damage to the estate of the said Delphia F. Sanders, if any.

Third Defense

These defendants and each of them allege that Delphia F. Sanders was the wife of Herbert Noah Sanders, the operator of the Hudson automobile involved in the collision; that said Herbert Noah Sanders was guilty of negligence and inattention at the time and place of the collision which caused and contributed to the fatal injuries suffered by Delphia F. Sanders and that the negligence of said Herbert Noah Sanders, being then and there the husband of said Delphia F. Sanders, is imputed to said Delphia F. Sanders and her estate.

Wherefore, having fully defended against said second cause of action, defendants pray plaintiff take nothing thereby; for their costs; for such other and further relief as may be proper.

SNELL & WILMER,

By /s/ JAMES H. O'CONNOR,

Attorneys for Defendants.

Copy mailed.

[Endorsed]: Filed March 30, 1955.

[Title of District Court and Cause.]

MINUTE ENTRY OF AUGUST 4, 1955

This case comes on regularly for trial this day. Carl Mangum, Esq., Harold Scoville, Esq., and J. Adrian Palmquist, Esq., appear for the plaintiff. Mark Wilmer, Esq., and T. J. Byrne, Esq., appear for the defendants.

Both sides announce ready for trial.

A Jury of twelve persons is now duly empaneled and sworn to try this case.

Thereupon, It Is Ordered that all Jurors not empaneled in the trial of this case be excused to Tuesday, August 9, 1955, at ten o'clock a.m.

On motion of counsel for the defendants, the Rule is invoked and the following witnesses are sworn, instructed by the Court and excluded from the Courtroom:

Gilbert Ripka (excepted)

Douglas C. Paxton

Sandra Martinez

Norma Sanders

Roy H. Bryfogle

Samuel Hurlbert

Wanda Sanders

Mrs. Fern Schulman

J. Adrian Palmquist, Esquire, states plaintiff's case to the Jury and Mark Wilmer, Esquire, makes a statement to the Jury on behalf of the defendants.

And thereupon, at 11:45 o'clock a.m., It Is Ordered that the further trial of this case be con-

tinued to two o'clock p.m. this date, to which time the Jury, being first duly admonished by the Court, is excused.

Counsel now stipulate that the defendants Gilbert Ripka and Wilson Brothers Truck Lines do not contest the issue as to agency and that the deaths were caused in the accident and as a result thereof and as a proximate result of the injuries sustained in the accident.

Counsel for plaintiff moves that the Rule on witnesses be relaxed as to minor children of deceased and that they be allowed to remain in the courtroom, and said motion is resisted by counsel for defendants and denied by the Court.

Whereupon, the parties and counsel are excused until two o'clock p.m.

Subsequently, at two o'clock p.m., the Jury and all members thereof, the parties and respective counsel being present pursuant to recess, further proceedings of trial are had as follows:

Plaintiff's Case:

Samuel Hurlbert, heretofore sworn, is called and examined in the plaintiff's behalf.

The following plaintiff's exhibits are now admitted in evidence:

- 1, map
- 2, photograph
- 3, map

Robert M. Fronske is now sworn and examined in the plaintiff's behalf.

Plaintiff's Exhibit 13, photograph, is now admitted in evidence.

Robert R. Harris is sworn and examined in the plaintiff's behalf.

The following plaintiff's exhibits are now admitted in evidence:

- 15, photograph
- 16, photograph
- 17, photograph
- 18, photograph
- 19, photograph
- 19a, enlargement of photograph
- 4, photograph
- 12, photograph

And thereupon, at 4:50 o'clock p.m., It Is Ordered that the further trial of this case be continued to Friday, August 5, 1955, at ten o'clock a.m., to which time the Jury, being first duly admonished by the Court, all parties and counsel are excused.

[Title of District Court and Cause.]

MINUTE ENTRY OF AUGUST 5, 1955

The Jury, and all members thereof, the parties and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Plaintiff's Case Continued:

Plaintiff's Exhibit #21, certified copies Letters of Special Administration, is now admitted in evidence.

Glenn L. Flake is now sworn and examined in plaintiff's behalf.

Plaintiff's Exhibits 20, and 22 to 34, inclusive, each being a photograph, are now admitted in evidence.

Defendants' Exhibits A and B, each being a photograph, are now admitted in evidence.

Phillip R. Cook is now sworn and examined on behalf of the plaintiff.

Plaintiff's exhibits 9 and 10, photographs, are admitted in evidence.

And thereupon, at 11:55 o'clock a.m., It Is Ordered that the further trial of this case be continued to 1:30 o'clock p.m., this date, to which time the Jury, being first duly admonished by the Court, the parties and counsel are excused.

Subsequently, at 1:30 o'clock p.m., the Jury and all members thereof, the parties and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Phillip R. Cook, heretofore sworn, is now recalled and further examined in the plaintiff's behalf.

Defendant's Exhibit C, Statement of Phillip R. Cook, is now admitted in evidence.

Cecil Louis Wedgworth is now sworn and examined in plaintiff's behalf.

Gilbert Ripka, heretofore sworn, is now called and cross-examined as an adverse party.

The following witnesses heretofore sworn are now called and examined in the plaintiff's behalf:

Norma Jean Sanders

Sandra Martinez

At 4:45 o'clock p.m., It Is Ordered that the further trial of this case be continued to Saturday, August 6, 1955, at 9:30 o'clock a.m., to which time the Jury, being first duly admonished by the Court, the parties and counsel are excused.

[Title of District Court and Cause.]

MINUTE ENTRY OF AUGUST 6, 1955

The Jury, and all members thereof, the parties and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Plaintiff's Case Continued:

The depositions of Edgar Pease, Marilyn Tulley, Mildred M. Saunders, Ellen Onstott and James Martinez are now read into evidence.

Plaintiff's Exhibit 43, snapshot, is now admitted in evidence.

The American Experience Mortality Tables in the Arizona Code 1939 as to the life expectancy of a person aged 39 and of a person aged 46 are now read into evidence.

Whereupon, the plaintiff rests.

Mark Wilmer, Esq., counsel for the defendants, now moves for a directed verdict in favor of the defendants and against the plaintiff, or in the alternative, for an order dismissing this action, and

It Is Ordered that said motion is denied.

Defendants' Case:

Dr. Harold F. Edwards is now sworn and examined in defendants' behalf.

And thereupon, at twelve o'clock noon, It Is Ordered that the further trial of this case be continued to 1:30 o'clock p.m., this date, to which time the Jury, being first duly admonished by the Court, the parties and counsel are excused.

Subsequently, at 1:30 o'clock p.m., the Jury and all members thereof, the parties and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

The following witnesses are now sworn and examined in defendants' behalf:

Hazel Cammack

Charles Cammack

Lily Mutch

Young Veasey, Sr.

Plaintiff's Exhibits 44, and 5 to 8 inclusive, being photographs, are now admitted in evidence.

It Is Ordered that Plaintiff's Exhibits 45 to 48, inclusive, marked for identification, may be withdrawn by counsel for the plaintiff.

Roy H. Bryfogle, heretofore sworn, is now examined in defendant's behalf.

Defendants' Exhibit D, metal box and contents, is now admitted in evidence.

It Is Ordered that Defendants' Exhibit F marked for identification may be withdrawn by counsel for the Defendants.

Defendants' Exhibit G, 3 photos, is admitted in evidence.

Plaintiff's Exhibit #37, photo enlargement, is now admitted in evidence.

It Is Ordered that counsel for the plaintiff be allowed to withdraw Plaintiff's Exhibit 49 for identification.

Defendants' Exhibit E, photograph, is now admitted in evidence.

Gilbert Ripka, heretofore sworn, is now called and examined in defendants' behalf.

And the defendants rest.

Both sides rest.

At 4:20 o'clock p.m., It Is Ordered that the further trial of this case be continued to Monday, August 8, 1955, at 10:30 o'clock a.m., to which time the Jury, being first duly admonished by the Court, the parties and counsel are excused.

[Title of District Court and Cause.]

MINUTE ENTRY OF AUGUST 8, 1955

At 9:00 o'clock a.m., J. Adrian Palmquist, Esq., and Harold Scoville, Esq., are present for the plaintiff. Mark Wilmer, Esq., and T. J. Byrne, Esq., are present for the defendants.

Instructions are now settled and counsel for defendants' renews defendants' motion for directed verdict, and makes offer of proof with respect to proposed testimony of witness Charles Cammack.

It Is Ordered that said motion for directed verdict is denied.

At 10:30 o'clock a.m., the jury, the parties and

counsel are present. The case is now argued to the jury by respective counsel.

At 11:45 o'clock a.m., It Is Ordered that the further trial of this case is continued to 1:00 o'clock p.m. this date, to which time the jury, being first duly admonished by the Court, the parties and counsel are excused.

Subsequently, at 1:00 o'clock p.m., the jury, parties and counsel are present and further proceedings of trial are had as follows:

The case is further argued to the jury by respective counsel. The Court instructs the jury. At 3:30 o'clock p.m., the jury retire in charge of sworn bailiff to consider their verdicts.

Subsequently, at 5:15 o'clock p.m., parties and counsel being present, the jury return into open Court and are asked if they have agreed upon verdicts. The foreman reports they have agreed and presents the following verdicts, to wit:

Civ-411

Ralph Wanek, Administrator of the Estates of Herbert Noah Sanders and Delphia F. Sanders,

Plaintiff,

Against

Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a Corporation,

Defendants.

VERDICT

We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the

issues made by the first cause of action in plaintiff's complaint and the answer thereto in favor of Ralph Wanek, Administrator of the Estate of Herbert Noah Sanders, deceased, and against defendants Gilbert Ripka and Wilson Brothers Truck Lines, a Corporation, and we do assess plaintiff's damages in the sum of \$65,000.00.

Dated: August 8, 1955.

MERLE ALLEN,
Foreman.

Civ-411

Ralph Wanek, Administrator of the Estates of Herbert Noah Sanders and Delphia F. Sanders,

Plaintiff,

Against

Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a Corporation,

Defendants.

VERDICT

We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the issues made by the second cause of action in plaintiff's complaint and the answer thereto in favor of Ralph Wanek, Administrator of the Estate of Delphia F. Sanders, deceased, and against defendants Gilbert Ripka and Wilson Brothers Truck Lines, a

Corporation, and we do assess plaintiff's damages in the sum of \$18,750.00.

Dated: August 8, 1955.

MERLE ALLEN,
Foreman.

The verdicts are read as recorded and no poll being desired by either side, the jury is discharged from the further consideration of this case and excused until Tuesday, August 9, 1955, at 10:00 o'clock a.m.

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTED INSTRUCTION NO. 8

If after consideration of the evidence and in accordance with the instructions and of the law as given you by the Court, you find that the plaintiffs are entitled to recovery, it will be necessary for you to assess damages for Ralph Wanek, Administrator of the Estate of Herbert Noah Sanders, deceased, and to Ralph Wanek, as Administrator for the Estate of Delphia F. Sanders, deceased, separately. The amount of damages should be fixed at the amount of the pecuniary loss to the estate of each of those two persons. It is not necessary that any witness should have testified as to the amount of any such loss, but you should take into consideration the earning capacities, habits, character and probable length of life of the deceaseds insofar as they

appear in the evidence and fix the damages at the present value of the probable accumulations by Herbert Noah Sanders and Delphia F. Sanders during their respective lifetimes had they lived their respective allotted time according to the Mortality Table read into the evidence. The amount of the damages, if any, should be such as the jury deems fair and just under the evidence in this case.

Jones v. Weaver,
123 Fed. (2d) 403.

Section 31-103, Arizona Code Annotated, 1939
Arizona Binghamton Copper Co. v. Dickson,
22 Ariz 163, 178, 195 Pac. 538.

Western Truck Lines Limited v. Berry,
52 Ariz. 38, 48, 78 Pac. (2d) 997.

Refused: 8/8/55, Covered by Defts. 4.

/s/ JAMES A. WALSH,
Judge.

[Endorsed]: Filed August 8, 1955.

[Title of District Court and Cause.]

VERDICT

We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the issues made by the first cause of action in plaintiff's complaint and the answer thereto in favor of Ralph Wanek, Administrator of the Estate of Herbert

Noah Sanders, deceased, and against defendants Gilbert Ripka and Wilson Brothers Truck Lines, a Corporation, and we do assess plaintiff's damages in the sum of \$65,000.00.

Dated: August 8, 1955.

/s/ MERLE ALLEN,
Foreman.

[Endorsed]: Filed August 8, 1955.

[Title of District Court and Cause.]

VERDICT

We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the issues made by the second cause of action in plaintiff's complaint and the answer thereto in favor of Ralph Wanek, Administrator of the Estate of Delphia F. Sanders, deceased, and against defendants Gilbert Ripka and Wilson Brothers Truck Lines, a Corporation, and we do assess plaintiff's damages in the sum of \$18,750.00.

Dated: August 8, 1955.

/s/ MERLE ALLEN,
Foreman.

[Endorsed]: Filed August 8, 1955.

[Title of District Court and Cause.]

MOTION FOR SUBSTITUTION OF PLAINTIFF AND FOR JUDGMENT UPON VERDICT

Comes now Ralph Wanek, Administrator of the Estates of Herbert Noah Sanders and Delphia F. Sanders, deceased, plaintiff in the above-entitled proceeding and respectfully moves the Court for orders to be made and entered herein as follows:

1. That Charles Crehore, the duly appointed, qualified and acting general administrator of the Estate of Herbert Noah Sanders, deceased, and general administrator of the Estate of Delphia F. Sanders, deceased, be substituted as the party plaintiff in the place and stead of the said Ralph Wanek, the special administrator of the estates of said decedents. That attached hereto and by reference made a part hereof are duly certified copy of the Letters of Administration issued to the said Charles Crehore in the Matter of the Estate of Herbert Noah Sanders, Deceased, Probate Cause No. 2511 by the Superior Court of the State of Arizona, in and for the County of Coconino, issued by the clerk of said court, and duly certified copy of the Letters of administration issued to the said Charles Crehore in the Matter of the Estate of Delphia F. Sanders, Deceased, Probate Cause No. 2513 by the Superior Court of the State of Arizona, in and for the County of Coconino, issued by the clerk of said Court.

2. That upon the substitution of the said Charles Crehore as such administrator of the estate of said decedent as plaintiff herein, judgment be entered upon the verdict heretofore returned in the above entitled court on the 8th day of August, 1955, in favor of the plaintiff and against the defendants in accordance with the provisions of said verdict, i.e., in favor of the plaintiff as Administrator of the Estate of Herbert Noah Sanders, deceased, in the sum of \$65,000.00, and in favor of the plaintiff as Administrator of the Estate of Delphia F. Sanders, deceased, and against the defendants in the sum of \$18,750.00, and in each instance for plaintiff's costs and disbursements herein expended.

The Motion for Substitution of the said Charles Crehore as General Administrator of the estates of said decedents is made upon the grounds and for the reason that the said Charles Crehore, by his appointment, is the successor to all the interest of present plaintiff as administrator in and to the assets of the Estates of Herbert Noah Sanders and Delphia F. Sanders, deceased, and the said Ralph Wanek, as Special Administrator is bound and obliged to surrender all of the same, including his claims herein as such administrator against said defendants, to the control of the General Administrator.

The consent of the said Charles Crehore, General Administrator of the estates of said decedents to his substitution as party plaintiff in the above entitled proceeding is attached hereto.

Rule 25, Rules of Civil Procedure.

Dated this 20th day of September, 1955.

LEWIS, ROCA, SCOVILLE &
BEAUCHAMP,

H. KARL MANGUM, and
J. ADRIAN PALMQUIST,

By /s/ HAROLD R. SCOVILLE,
Attorneys for Plaintiff.

NOTICE

To Gilbert Ripka and Wilson Brothers Truck Lines,
Inc., and Snell & Wilmer, their attorneys of
record:

You and Each of You will please take notice that
we will urge the above and foregoing Motion at
the next regular call of the motion calendar for the
Prescott Division of the above-entitled court, or at
such time as the court may fix for the hearing
thereof.

Dated this 20th day of September, 1955.

LEWIS, ROCA, SCOVILLE &
BEAUCHAMP,

H. KARL MANGUM, and
J. ADRIAN PALMQUIST,

By /s/ HAROLD R. SCOVILLE,
Attorneys for Plaintiff.

Copy Mailed.

[Endorsed]: Filed Sept. 20, 1955.

[Title of District Court and Cause.]

OBJECTION TO SUBSTITUTION OF PLAINTIFF AND OBJECTION TO ENTRY OF JUDGMENT UPON THE VERDICT

Comes Now defendants and object to the Substitution of Charles Crehore as Administrator of the Estate of Herbert Noah Sanders, deceased, and as Administrator of the Estate of Delphia F. Sanders, deceased, as plaintiff in the above entitled and numbered cause and to the entry of judgment in favor of said Charles Crehore as such general administrator in accordance with the verdict of the jury upon the following grounds:

1. No valid verdict has ever been returned in the above entitled cause for the reason that Ralph Wanek sued as general administrator of the estates of Herbert Noah Sanders and Delphia F. Sanders whereas in fact he was not such general administrator but a special administrator and as such special administrator had no authority to bring or maintain the action.

2. There is no showing that the affairs of said special administrator have been wound up by the probate court of the State of Arizona, and the transfer of the cause of action from the special administrator to a general administrator approved and authorized by the said probate court. The federal court is not a court of probate jurisdiction and has no authority to interfere in probate matters and order the transfer of the cause of action from

the special administrator to a general administrator, if such cause of action exists. In the absence of an appropriate order of the probate court of the State of Arizona and an appropriate transfer of the rights of the plaintiff Ralph Wanek as special administrator, the federal court has no authority to order such substitution. The record is silent as to any assignment or other transfer of the rights of said plaintiff under the verdict as returned by the jury.

Respectfully submitted,

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Defendants.

[Endorsed]: Filed October 10, 1955.

[Title of District Court and Cause.]

MINUTE ENTRY OF OCTOBER 10, 1955

Plaintiff's Motion for Substitution of Plaintiff and for Judgment upon Verdict comes on regularly for hearing this day. Joseph E. McGarry, Esq., is present for the plaintiff. Mark Wilmer, Esq., is present for the defendants. Counsel for the plaintiff urges plaintiff's motion for substitution of plaintiff and for judgment upon the verdict. Counsel for the defendant states objections thereto.

It Is Ordered that plaintiff's motion for substitution of plaintiff is granted and that Charles

Crehore, General Administrator of the Estates of Herbert Noah Sanders and Delphia F. Sanders be substituted as party plaintiff in the place and stead of Ralph Wanek, the special administrator of the estates of Herbert Noah Sanders and Delphia F. Sanders, and

It Is Ordered that the Clerk enter judgment herein in favor of the plaintiff and against the defendants Ripka and Wilson Brothers Truck Lines, Inc., a corporation in accordance with the verdicts returned herein on August 8, 1955.

On motion of counsel for the defendants,

It Is Ordered that a stay of execution is granted until ten days following the termination of the motion for a new trial which counsel indicates will be made.

[Title of District Court and Cause.]

DOCKET ENTRY—OCTOBER 10, 1955

Enter judgment in favor of the plaintiff Charles Crehore, General Administrator of the Estates of Herbert Noah Sanders & Delphia F. Sanders, and against the defendants Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, in the sum of \$65,000.00 on the issues made by the first cause of action in the plaintiff's complaint and defendants' answers thereto, and enter judgment in favor of the plaintiff Charles Crehore, general Administrator of the Estates of of Herbert Noah

Sanders & Delphia F. Sanders, and against the defendants Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, in the sum of \$18,750.00 on the issues made by the second cause of action in plaintiff's complaint and defendants' answers thereto, in accordance with the verdicts.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING
THE VERDICT OR IN THE ALTERNATIVE
FOR A NEW TRIAL

Come Now defendants and move the Court for judgment notwithstanding the verdict of the jury upon the ground that the special administrator had no authority to bring or maintain the action and upon the further ground that the evidence was insufficiently definite and certain to warrant the verdict of the jury. We therefore move that the judgments entered upon the verdict of the jury be set aside and defendants' motion for a directed verdict reinstated and granted and judgment rendered for the defendants.

In the alternative, and should the foregoing motion be not granted, then defendants move the Court for an order setting aside the verdict of the jury heretofore returned herein and the judgment entered thereon in the first cause of action in the above entitled and numbered cause and likewise as a separate motion defendants move the Court that the verdict of the jury heretofore rendered herein

and the judgment entered thereon be set aside and a new trial granted as to the second cause of action upon the following grounds and for the following reasons, each of which said ground and reason is directed separately to each cause of action:

1. Errors committed by the Court in the reception of evidence objected to by the defendants.

2. Errors of law in rejecting evidence offered by defendants and objected to by plaintiff.

3. Error committed by the Court in refusing to dismiss each of said causes of action upon proof that the plaintiff therein as to each said cause of action was attempting to prosecute the same as a special administrator for the reason that such special administrator for the reason that such administrator had no lawful authority to bring or prosecute such action; failure of the Court to grant motions for directed verdict for the same reason.

4. Persistent and wilful misconduct of counsel for the plaintiff in injecting inflammatory and prejudicial matters into the record before the jury throughout the trial of the cause, whereby as a cumulative result thereof defendants were denied a fair trial.

5. The verdict in each cause of action is the result of passion, prejudice and sympathy on the part of the jury whereby defendants, and each of them, have been denied a fair trial.

6. Errors of law committed by the Court in instructions to the jury.

7. The verdicts and the judgments entered thereon are unsupported by the evidence and based upon speculation and surmise.

Respectfully submitted,

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Defendants.

MEMORANDUM IN SUPPORT OF MOTION

Without waiving the other portions of the motion for a new trial, inasmuch as the other matters have been heretofore presented to the Court on several occasions, we will restrict the memorandum to the two points which we believe clearly warrant a new trial.

The first of these is the persistent misconduct of plaintiff's counsel, Mr. Palmquist. While it is of course true that ordinarily there must be objections to misconduct of counsel, the rule is otherwise where objection would not cure the misconduct. We have specific reference to the constant reference throughout the trial by Mr. Palmquist to the fact that he was there representing the minor children of the deceased and that he did not even know who Mr. Wanek was; his request in the presence of the jury that the children be permitted to remain in the courtroom through the trial as the real parties in interest, and numerous other remarks, inferences and statements made throughout the trial and

through the course of his argument to the jury, both his opening argument and his closing argument, including improper references to the measure of damages.

In addition, he was constantly outside the record with respect to matters which were not in evidence and in a fashion which rendered it fruitless to object or further accentuate the matter by objections.

Sadler vs. Arizona Flour Mills Company,
121 P. 2d 412, 58 Ariz. 486.

With respect to the second point, that is, that the verdict is clearly the result of passion and prejudice, we believe the amount of the verdict is such that no conclusion other than passion and prejudice can be reached. When it is remembered that the plaintiff, Herbert Noah Sanders, was a man forty-six years old whose total accumulations consisted of approximately \$2,400 in cash, a Hudson car, household furnishings of undisclosed value, which represented the community property of himself and the other plaintiff, totalling probably at the most \$4,000, or a total of \$2,000 the property of the father and \$2,000 the property of the mother.

It is further undisputed that at the time of the accident he was unemployed, and while we must accept as true under the jury's verdict that he was returning to California in the hopes of obtaining evidence to set aside his disqualification for employment a White Sands because of suspected tubercu-

losis, the fact remains that he was unemployed and had been unemployed for some time.

The record was clear to the effect that Mrs. Sanders was without earning capacity and therefore her accumulations would be related only to such as were made by Mr. Sanders. Accordingly, we have a gross verdict of \$83,750 related to the earning capacity and ability of Mr. Sanders. Even at three per cent simple interest, this amounts to \$2,512.50 per year interest. Without compounding this as we would be entitled to do in properly figuring the present value and taking only a life expectancy of ten years, we have an additional \$25,000 to add to the verdict of \$83,750, which is a total of \$108,750.

Taking into account present day income taxes and giving account to living expenses, it is apparent the jury concluded that for the next ten years of his life, Mr. Sanders would earn in the neighborhood of \$30,000 a year, since this amount would be necessary to pay income taxes, take care of living expenses and accumulate the amount of money which the jury allowed him.

While we recognize that in proper cases the Court may order a remittitur, we do not believe that such is in order here, inasmuch as the rule is that where there are other issues involved as to which there is a serious dispute, and it is clear the verdict is the result of passion and prejudice, then it is presumed that that passion and prejudice carries over to and affects the determination of the jury with respect to the other issues involved. In this case

there was a serious dispute between the parties as to whether or not there was any liability on the part of the defendants. It was their position, testified to unequivocally by the driver Ripka, that he was on his proper side of the highway proceeding along properly when the Sanders vehicle cut across the highway and into him, and an examination of the pictures of his truck would indicate that such did in fact happen.

It is therefore respectfully submitted that the only alternative afforded under the circumstances is an order for a new trial rather than a remittitur which would not cure the error of the jury in respect to the other issue of liability.

In the case of *Brabham vs. State of Mississippi*, 96 F. 2d 210, the Fifth Circuit laid down this rule:

“We agree with appellants, too, that a new trial ought to have been granted instead of trying to ameliorate a verdict which the trial judge concluded was oppressive and amounted to an injustice. * * * Verdicts made excessive by the passion and prejudice springing from indulgence, in the jury room, in such feelings, may not be cured by a remittitur, but only by a new trial. * * *

* * *

“* * * We understand that while mere excessiveness in the amount to be awarded may be cured by a remittitur, that excessiveness which results from passion and prejudice, however

natural the resentment which arouses it, may not be so cured.”

With respect to the motion for judgment notwithstanding the verdict, we believe the law to be that a special administrator, without proper authorization contained in his order of appointment may not bring and prosecute an action for wrongful death. We have argued this point before and will not further trespass on the Court's time.

In addition, we believe that the evidence was insufficiently definite and certain to avoid a finding of liability on the part of the defendants.

Respectfully submitted,

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Defendants.

Copy received.

[Endorsed]: Filed October 18, 1955.

[Title of District Court and Cause.]

MINUTE ENTRY OF NOVEMBER 7, 1955

Defendants' Motion for Judgment Notwithstanding the Verdict and in the Alternative for a New Trial comes on regularly for trial this day. Harold Scoville, Esq., is present for the plaintiff. Mark

Wilmer, Esq., is present for the defendants. Defendants' Motion is argued by respective counsel, submitted and taken under advisement.

[Title of District Court and Cause.]

MINUTE ENTRY OF DECEMBER 16, 1955

It Is Ordered that the Defendants' Motion for Judgment Notwithstanding the Verdict is denied, and

It Is Further Ordered that the Defendants' Motion for a New Trial is denied.

(Docketed December 16, 1955.)

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a Corporation, defendants in the above-entitled and numbered action hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in the above-entitled and numbered cause on the 10th day of October, 1955, and from the order entered in the above-entitled and numbered cause on the 16th day of December, 1955, denying motion of said defendants and each of them for judgment notwithstanding the verdict and further from the order entered in the above-entitled and numbered cause

on the 16th day of December, 1955, denying the motion of said defendants for a new trial.

SNELL & WILMER,

By /s/ MARK WILMER,

By /s/ JAMES H. O'CONNOR,

Attorneys for Said Defendants.

[Endorsed]: Filed Dec. 29, 1955.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, as principals, and Commercial Standard Insurance Company of Forth Worth Texas, a corporate surety, as surety, jointly and severally acknowledge that we and our personal representatives, successors and assigns are bound to pay to Charles Crehore, Administrator of the Estates of Herbert Noah Sanders and Delphia F. Sanders, deceased, plaintiff in the above-entitled cause the sum of Two Hundred Fifty Dollars (\$250).

The condition of this bond is that whereas the defendants, Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, have appealed to the Court of Appeals for the 9th Circuit by Notice of Appeal filed December 29, 1955, from the judgment entered in the above-entitled and numbered cause on the 10th day of October, 1955, and from the order entered in the above-entitled and numbered

cause on the 16th day of December, 1955, denying the motion of said defendants and each of them for judgment notwithstanding the verdict and further from the order entered in the above-entitled and numbered cause on the 16th day of December, 1955, denying the motion of said defendants for a new trial, if the defendants Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, shall pay all costs adjudged against them if the appeal is dismissed or the judgment affirmed, or such costs as the said appellate court may award if the judgment is modified, then this bond is to be void, but if the defendants. Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, fail to perform this condition, payment of the amount of this bond shall be due forthwith.

Dated January 9, 1956.

GILBERT RIPKA,

WILSON BROTHERS TRUCK
LINES, INC.,

By /s/ MARK WILMER,
Their Attorney.

[Seal] COMMERCIAL STANDARD
INSURANCE COMPANY OF
FORT WORTH, TEXAS,

By /s/ D. M. RANEY,
Attorney-in-Fact.

Power of attorney attached (Commercial Standard Ins. Co., to D. M. Raney or Charles Bray).

[Endorsed]: Filed Jan. 11, 1956.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD OF APPEAL

Pursuant to Rule 75, defendants Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, hereby designate the following to constitute the transcript of record on appeal in the above-entitled cause:

1. The amended complaint of Ralph Wanek, Administrator of the Estates of Herbert Noah Sanders and Delphia F. Sanders, deceased, formerly plaintiff herein.

2. The answer to said amended complaint of Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation.

3. All minute orders entered herein, including specifically the minute order for judgment and the judgment entered thereon on October 10, 1955, and specifically the orders entered December 16, 1955, denying the motion of defendants for judgment notwithstanding the verdict and denying the motion of defendants for a new trial.

4. All exhibits, either marked for identification or offered and received in evidence.

5. All instructions requested by the plaintiff and all instructions requested by defendants.

6. Reporter's transcript of evidence and proceedings.

7. Defendants' notice of appeal heretofore filed herein.

8. This designation of contents of record on appeal.

SNELL & WILMER,

By /s/ MARK WILMER,

By /s/ JAMES H. O'CONNOR,

Attorneys for Said Defendants.

Copy received.

[Endorsed]: Filed Dec. 29, 1955.

[Title of District Court and Cause.]

AMENDED DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

Come Now defendants Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, and designate, in addition to the matters hereinbefore designated, the Bond for Costs on Appeal, filed with the Clerk of the United States District Court for the District of Arizona on January 11, 1956.

SNELL & WILMER,

By /s/ MARK WILMER,

By /s/ JAMES H. O'CONNOR,

Attorneys for Said Defendants.

Copy mailed.

[Endorsed]: Filed Jan. 11, 1956.

[Title of District Court and Cause.]

**SUPPLEMENTAL AMENDED DESIGNATION
OF CONTENTS OF RECORD ON APPEAL**

In addition to the matters hereinbefore designated, defendants Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, designate the following instruments:

1. Plaintiff's Motion for Substitution of Plaintiff and for Judgment on the Verdict.
2. Consent of Charles Crehore to Appointment as Party Plaintiff.
3. Defendants' Objection to said Motion and to the Entry of Judgment upon the Verdict.
4. Defendants' Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial.
5. Docket Entry of Judgment Pursuant to Order of the Court for Judgment.

SNELL & WILMER,

By /s/ MARK WILMER,

By /s/ JAMES H. O'CONNOR,

Attorneys for Said Defendants.

Copy mailed.

[Endorsed]. Filed Feb. 2, 1956.

[Title of District Court and Cause.]

ORDER

It Is Ordered that the time for filing the record on appeal and docketing the appeal herein in the

United States Court of Appeals for the Ninth Circuit be, and it is hereby, extended to and including February 17, 1956.

Dated at Phoenix, Arizona, this 3rd day of February, 1956.

/s/ DAVE W. LING,

United States District Judge.

[Endorsed]: Filed Feb. 3, 1956.

In the United States District Court for the
District of Arizona
Number Civil 411-Prescott

RALPH WANEK, Administrator of the Estates
of Herbert Noah Sanders and Delphia F.
Sanders, Deceased,

Plaintiff,

vs.

GILBERT RIPKA; WILSON BROTHERS
TRUCK LINES, INC., a Corporation,

Defendants.

Appearances:

J. ADRIAN PALMQUIST;
MANGUM AND FLICK, by
CARL MANGUM; and
LEWIS, ROCA, SCOVILLE AND BEAU-
CHAMP, by
HAROLD SCOVILLE,

For the Plaintiff.

SNELL AND WILMER, by
MARK WILMER; and
BYRNE AND BYRNE, by
T. J. BYRNE,

For the Defendants.

The above-entitled case came up for trial on the 4th day of August, 1955, at Prescott, Arizona, before the Honorable James A. Walsh, Judge, and a jury, and the following proceedings were had, to wit:

The Court: The Clerk will call the names of eighteen jurors. As your names are called will you please come forward and take your seats in the box which the Bailiff will indicate.

(The jury panel was called and sworn.)

The Court: Gentlemen, the case that is about to go to trial is a civil action. I say civil action as distinguished from a criminal case. It is an action for damages brought by a Mr. Ralph Wanek, who I understand lives at Flagstaff, Arizona. He brings the action as administrator, that is the personal representative of two deceased people; one is Herbert Noah Sanders and the other is Delphia F. Sanders. Both of the Sanders, Herbert Noah and Delphia F. are deceased. In their lifetimes they were husband and wife and residents of Oakland, California. As I say, the plaintiff in the action is a man named Ralph Wanek, who brings the action on behalf of the estates of the Sanders. Mr. Wanek

is styled the plaintiff in the action, or the party who brings it; the defendants, or the parties who are sued in the action, is a man named Gilbert Ripka, who I understand is present in Court here. He is the gentleman at the end of the counsel table. I understand Mr. Ripka resides in Indiana. Mr. Ripka is one defendant and a corporation organized under the laws of Missouri, under the name of Wilson Brothers Truck Lines, Inc., a corporation, is the other defendant in the case.

The plaintiff Wanek is represented in the action by Mr. Carl Mangum, an attorney of Flagstaff. Will you rise, please, Mr. Mangum. Mr. Carl Mangum is an attorney who practices at Flagstaff. Mr. Harold Scoville, an attorney that practices at Phoenix, a member of the firm of Lewis, Roca, Scoville and Beauchamp; and Mr. J. Adrian Palmquist, an attorney that [2*] practices at Oakland, California. Those gentlemen are the plaintiff's counsel in the case.

The defendants, Mr. Ripka and Wilson Brothers Truck Lines, Inc., are represented by Mr. Mark Wilmer. Mr. Wilmer is a member of the firm of Snell and Wilmer of Phoenix, Arizona; and the defendants are also represented by Mr. T. J. Byrne, who practices in Prescott. He is a member of the firm of Byrne and Byrne.

Now, I am not going to undertake to tell you all of the issues that may arise in the case or all the issues that may be presented to you, but I am at

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

this time going to tell you in a general sort of way what the case is about; in other words, what the parties in the matter are contending, so you will have some understanding of the nature of the case and what it is about in the main part.

As I said, it is a suit by Ralph Wanek as administrator of the estates of Herbert Noah Sanders and Delphia F. Sanders, but it is in reality two suits. It is a suit by Ralph Wanek as administrator of the estate of Herbert Noah Sanders; that is the first cause of action in the case. And the second cause of action is a suit by Ralph Wanek as administrator of the estate of Delphia F. Sanders, deceased. So we really have two lawsuits in the case because there are two causes of action. The two lawsuits are brought by the plaintiff Wanek as administrator of these estates against the defendants Ripka and Wilson Brothers Truck Lines, Inc. In his complaint in the [3] case, in both causes of action, Wanek claims that on or about July 10 of last year, about 3 o'clock in the morning, the Sanders, the deceased husband and wife, were occupants of an automobile that was being operated on U. S. Highway 66 about seven miles west of Flagstaff. The plaintiff Wanek alleges that at that time and place the defendant Ripka was driving a truck on the same highway, and that while driving it he was an employee and agent and servant of Wilson Brothers Truck Lines, Inc.; and engaged in the course of their business. In other words, he was working for them and in the scope of his business and employment at the time of these occurrences. The plain-

tiff alleges further at that time and place Ripka so wilfully or recklessly or negligently managed the truck he was driving that he caused it to go across the white line onto the wrong side of the highway and to collide with the car in which the Sanders were passengers. And Wanek alleges further that by reason of that condition there was a collision and the Sanders were killed. He asks damages on behalf of the estates of the deceased people against Ripka and the Truck Line, Wilson Brothers Truck Line.

On the part of the defendants, Ripka and Wilson Brothers Truck Line admit at the time and place alleged, Ripka was driving the truck on the highway and he was driving it as an employee of Wilson Brothers Truck Line. But they deny that Ripka is guilty of any negligence or wrongful act or omission [4] which brought about the collision; and they deny any negligence on the part of either of the defendants was responsible for the collision or for the deaths of the deceased persons. They allege further that if the Sanders were killed in this collision, that the collision and their consequent deaths were caused or proximately contributed to by the negligence of the deceased persons themselves. The defendants contend therefore they have no liability to the plaintiff in the action and that the plaintiff should take nothing from them in the case.

Gentlemen, I have identified all the parties in the case to you and the attorneys in the case, and I have told you in a general way what the case is about. And my purpose in doing that is because now

I propose to address to you collectively certain questions, and when I have finished perhaps counsel will have some questions. And we ask that if you would answer any particular question in the affirmative, in other words, if your answer to a question would be yes, indicate that by raising your hand, because it may be the Court or counsel will want to follow up that particular question with you individually. May I say to you before I start the questions that we don't ask the questions to waste time or pry into your business or affairs, but really for the purpose of enabling the Court, counsel and yourself in ascertaining whether or not you are in a fair frame of mind that you must and should be in in order to sit in good conscience as a juror in the case. [5] That is the purpose of the questions. We ask therefore that you listen to them carefully, and, as I say, if you answer any particular question in the affirmative indicate that by raising your hand.

I will ask first if there is any prospective juror who is acquainted with the plaintiff Ralph Wanek. As I say, he lives in Flagstaff. Do any of you have any acquaintance with Ralph Wanek? Did any of you have any acquaintance with Herbert Noah Sanders in his lifetime, to your knowledge, or with Delphia F. Sanders? Are any of you acquainted with the defendant Gilbert Ripka? Is there any member of any juror's immediate family who is acquainted or was acquainted with any of the people I mentioned, that is, Mr. Wanek or the deceased Herbert Noah Sanders or the deceased Mrs. Delphia

F. Sanders, or Gilbert Ripka? Is there any juror who has ever had any business or transaction of any nature or description with the defendant Wilson Brothers Truck Lines, Inc.? Has any lawyer who is participating in the case, that is, Mr. Mangum, Mr. Scoville, Mr. Palmquist, Mr. Wilmer or Mr. Byrne, have any of those men ever been your attorney or handled any legal business for you as your attorney?

Mr. Price (A Juror): Mr. Mangum has handled some legal work for me.

The Court: Is he currently handling work for you?

Mr. Price: No, sir. [6]

The Court: How recently has he done work for you, sir?

Mr. Price: About a year ago.

The Court: And that business is completely concluded at this time?

Mr. Price: That is correct.

The Court: Do you look upon Mr. Mangum as your regular attorney?

Mr. Price: No.

The Court: In other words, the business you had with him is concluded and you don't consider him to be your regular attorney?

Mr. Price: That is right.

The Court: I will ask you, Mr. Price, if that experience with Mr. Mangum or connection with him, if that would in any manner influence you or bias you or prejudice you at all in the trial of this case if you were called on to sit in this trial?

Mr. Price: It shouldn't.

The Court: You say it shouldn't. Would you permit it to influence you at all in the trial of the case?

Mr. Price: No.

The Court: Is it your statement you would and could try the case and be just and fair to both sides and do your duty just as fully and fairly as if you had never known Mr. Mangum? [7]

Mr. Price: That is right.

The Court: And you would do that if chosen as a juror?

Mr. Price: That is right.

The Court: Was there any other prospective juror who indicated——

Mr. Hill (A juror): Mr. Wilmer's firm represents my employers. I believe Mr. Mangum has also done so at various times. Also Mr. Byrne represents the corporation of which I am an officer, not representing me personally.

The Court: Your employer has Mr. Mangum and Mr. Wilmer as its counsel?

Mr. Hill: Yes, sir.

The Court: And the corporation of which you are an officer is represented by Mr. Byrne?

Mr. Hill: That is right.

The Court: What office do you hold in that corporation?

Mr. Hill: President.

The Court: May I ask you this, Mr. Hill, in connection with your employment or in connection with your interest in the corporation do you have frequent occasions to consult with these men?

Mr. Hill: Not very frequently, no, sir.

The Court: And in the relationship none of these men is your personal attorney?

Mr. Hill: No, sir. [8]

The Court: May I ask you the same questions, Mr. Hill. Any connection that you have with these attorneys, would that in any manner influence you or bias you or prejudice you if you were called on to sit in the trial of this case?

Mr. Hill: No, sir.

The Court: Would there be any embarrassment to you in sitting in the trial of this case and then having to meet or transact business with any of these lawyers thereafter?

Mr. Hill: None at all.

The Court: I take it you also would, if you sat in the trial of this case, would render a verdict fairly and justly, based on the evidence you got from the witness stand and under the Court's instructions as to the law.

Mr. Hill: I would.

The Court: Thank you, sir. Is there any other gentleman who indicated a representation by any of the lawyers in the case?

I will ask if any of you have ever been represented or stood in the relationship of client to any members of the firms of any of these men? In other words, you may not have been a client of the men in the courtroom, but have any of you been a client or stood in the relation of client to members of their firms? Is there any juror who has a member of your immediate family—by that I mean your wife,

son or daughter—who to your knowledge has been a client or [9] represented by any of the attorneys or their firms?

Mr. Born (A member of the jury panel): My mother and father were represented by Mr. Byrne.

The Court: Would that fact, Mr. Born, in any manner influence you or bias you or prejudice you in the trial of this case?

Mr. Born: No, sir.

The Court: It wouldn't have any bearing at all on your consideration or your verdict, the fact your parents had been represented by Mr. Byrne?

Mr. Born: No, sir.

The Court: Thank you, sir.

I take it that apart from having been represented by any of these gentlemen as attorneys, some of you may have some other business or social acquaintance with one or more of the attorneys; and I will ask if there is any prospective juror who has a business or social acquaintance with any attorney in the case, apart from their representing you as counsel, do any of you have a business or social acquaintance with any of the lawyers in the case? Is there any prospective juror who knows anything about the facts or purported facts of the case? In other words, have any of you prior to coming here today and hearing the Court's brief statement about what the case is about, have any of you read anything about it or heard anything about it or in any fashion obtained any [10] information what the facts of the case are or what are purported to be the facts of the case?

Is there any prospective juror who doesn't drive an automobile? Any juror who does not drive a car? Is there any prospective juror who either now or in the past has made a livelihood in the occupation of truck driver? Have any of you ever been a truck driver?

(A member of the jury panel, Mr. Potter, raises hand.)

The Court: Is that true now, Mr. Potter, or in the past?

Mr. Potter: In the past.

The Court: How recently, sir?

Mr. Potter: Four years ago.

The Court: Were you engaged in driving trucks for a long period?

Mr. Potter: About three years.

The Court: Was that for yourself or were you employed by somebody else?

Mr. Potter: I was employed by somebody else.

The Court: What type of equipment did you handle?

Mr. Potter: Just a bobtail meat delivery truck.

The Court: It was a light truck, engaged in meat delivery?

Mr. Potter: Yes.

The Court: Is that your entire experience driving [11] trucks?

Mr. Potter: That is all.

The Court: Is there anybody else who either now or in the past has been employed as a truck driver?

(A member of the jury panel, Mr. Sexton, raises hand.)

The Court: Mr. Sexton, is that true now or has it been in the past?

Mr. Sexton: It has been in the past.

The Court: How recently, sir?

Mr. Sexton: About six or seven years ago.

The Court: Were you engaged in that employment for some period of time?

Mr. Sexton: For approximately sixty days.

The Court: That is your total experience in driving trucks?

Mr. Sexton: Yes, sir.

The Court: What type equipment did you handle?

Mr. Sexton: That was local delivery.

The Court: Light truck?

Mr. Sexton: Yes. It was for Alabam, city delivery around town.

The Court: Any other juror who has been employed as a truck driver? Is there any prospective juror who either now or in the past has managed or operated a trucking line?

Mr. Allen: We operate our own trucks. We have eight [12] trucks on the highway.

The Court: That is not the trucking business? What is your regular business, Mr. Allen?

Mr. Allen: Wholesale grocery. We do run a big truck from the Coast, San Francisco and Los Angeles to Prescott regularly.

The Court: In other words, you haul your own merchandise?

Mr. Allen: To a great extent.

The Court: Is that your only experience in trucking?

Mr. Allen: Yes, sir.

The Court: And that has been true in connection with your wholesale grocery business?

Mr. Allen: Yes.

The Court: Was there any other juror that indicated——

Mr. Price: I have a similar setup that Mr. Allen has, only mine is wholesale business.

The Court: Is there anybody else in the trucking business or managed or operated a truck line? Is there any prospective juror who has a feeling of bias or prejudice one way or the other about cases of this type, that is, actions for damages growing out of motor vehicle accidents? Is there anyone at this time that has a bias or prejudice one way or the other about cases of that type, or do any of you have a bias or prejudice one way or the other about damage suits [13] generally, whether they are growing out of a motor vehicle accident or not? Is there any prospective juror that has ever been a claimant for damages against somebody else for damages growing out of a motor vehicle accident? Any of you claimed damages against somebody else?

Mr. Stoop (A member of the jury panel): About eight or nine years ago we had a damage suit, but that wouldn't affect anything but what I can render——

The Court: A fair verdict?

Mr. Stoop: —a fair verdict.

The Court: Were you the one that claimed the damages, Mr. Stoop?

Mr. Stoop: My wife.

The Court: Did you actually go to trial with it or was it settled?

Mr. Stoop: It was settled through Federal Court.

The Court: I understand you to say that experience wouldn't in any manner influence you or affect you at all if you were chosen as a juror to try this case?

Mr. Stoop: No.

The Court: Was there any other juror who indicated he had been a claimant for damages against somebody else, growing out of an automobile accident; or has any member of the juror's immediate family, other than Mr. Stoop, who indicated his wife had been, is there any member, immediate member of a juror's [14] family that has had any injuries grow out of an automobile accident; or any juror other than Mr. Stoop that has ever been a claimant for damages for personal injuries sustained in any fashion, whether in an automobile accident or not? Has any juror ever had a claim for damages made against him for damages claimed to have arisen out of an automobile accident? In other words, have you been the person against whom the claim for damages was presented? Or has any of you ever been the person against whom a claim for damages growing out of any type of accident has been presented?

I take it you gentlemen all understand from your

previous service here that at the end of every jury trial after the evidence is in and after counsel have argued the case to you that the Court then instructs you as to the law you will apply in your deliberations. In other words, gentlemen, you understand that in a jury case the jury and only the jury finds the facts of the case. The jury hears the witnesses, considers the exhibits, takes all of the testimony into account and the jury determines what the facts are, what actually happened. Then the jury in arriving at a verdict applies to those facts as they find them the law as the Court gives the jury in the instructions. And it is a juror's duty in sitting in a case of this type or any jury case to take the instructions as the Court lays them down. In other words, the jury must apply in consultation the law as the Court gives it in [15] the instructions. Is there any juror who feels he would not or could not accept and carry out that obligation if he were chosen as a juror to try this case?

Does any juror know any reason whatever, whether I have adverted to it or not, any reason whatever why he could not if he sat in this case be fair to both sides in the case, be fair to the plaintiff and be fair to the defendants, and base his verdict solely and exclusively on the evidence as it came from the witness stand and on the Court's instructions as to the law?

Counsel may examine.

Mr. Palmquist: Individually or collectively?

The Court: Collectively, please.

Mr. Palmquist: Gentlemen, when I address

these questions I would like to have you consider I am talking individually to each one of you; and if anyone feels they should speak up and answer I would appreciate your holding up your hand.

The first question I would like to ask is, and I am sure I don't have to ask it, is there anyone here that would be so provincial they would have any prejudice against any party because he happens to be from out of Arizona, or the people that were involved happened to be from California and some others from some other state? And I say I am sure I don't have to ask that question in this day and age when the [16] remotest part of the world is only sixty hours from Prescott. If there is anyone that has that prejudice I would like to have you raise your hand.

Gentlemen, this case started with the loss of lives and has resolved itself into a question of money, dollars and cents; and this is what this lawsuit is all about. You will be told sometime during the progress of this trial, and I will bring it out now, that for the loss of the husband and father involved is a prayer of \$150,000. The estate brings that claim. In the case of the wife and mother there is a prayer of \$75,000; and I will stipulate with all of you that is a lot of money. But my question right now is this: Is there anyone that has any prejudice, that just based on dollars and cents or an amount of money alone, that just the mere mention of those sums of money, that kind of money, so inflames you you couldn't sit and listen to the evidence with an open mind and a fair heart? I take it then that by

your silence, by your failure to raise hands there isn't a man sitting on this jury that if by the evidence and the common sense and by the law as His Honor will give it to you, in a matter of life expectancy and arithmetic that if we can prove to you that the estates in this case are entitled to those kind of verdicts, that there isn't a man here that would hesitate to bring in that verdict simply because of the amount of money in and of itself? [17]

I would also like to know if there is anyone on this jury that interprets the word "reasonable" to mean cheap or inadequate? I take it by your failure to raise your hands, you would consider "reasonable" to include fairness and adequacy.

I would like to know whether or not any of you gentlemen would find any difficulty in interpreting into dollars and cents, projecting yourself into the future of a deceased's life, and following his Honor's instructions as to the character and habits, health and earning capacity of a decedent; and to interpret such human values into property values or to come up with a dollar and cents verdict, the only kind of verdict that can be rendered, if one is returned, for the loss of these lives. Is there anyone here that would find that repulsive for any reason, or repugnant, or that would feel they couldn't be fair as appraisors of such valuation, in rendering a decision in this court? I take it by your silence, gentlemen, you feel you could follow such.

I would also like to know if there is anyone here who feels that they would be inclined to try the

respective lawyers, rather than the case. I am sure I don't have to ask that question; but sometimes I find I am on trial, rather than the case I am representing. I take it you gentlemen will try the case.

I would also like to know if there is anyone here that [18] feels that he would be unable to bring his common sense into the jury room with him, and exercise his common sense, in appraising physical evidence, as opposed, say, to some opinions that might be brought in verbally. I take it, gentlemen, that based on your failure to raise your hands, and on these questions I have asked, you can be absolutely fair and just to both sides in this case.

There is just one other question I would like to ask you collectively. Is there anyone here who is, because of a philosophy, sometimes called a fatalistic philosophy, or because of some religious belief, or because of their way of thinking, that believes in what is called the inevitability of accidents, that these things have just got to happen, that there is no way of avoiding them? Such a doctrine excludes courtesy on the highway, and excludes a safe and sane driver. Is there anyone that subscribes to this doctrine—we will call it the inevitability of accidents? I take it by your failure to raise your hands, that all of you agree that accidents can be prevented by safe and sane driving.

Is there anyone here that feels that a person who is a wrongdoer in an accident should not be held accountable under the law? I take it your answer to that is that you feel he should be accountable.

Involved in this, by the way, is a corporation. I

understand some of you men are corporation men. Is there [19] anyone here who feels the law is wrong or unfair, in holding a principal or a master responsible for the acts of his agent or employee or servant? I take it by your failure to raise your hands, that you feel that is a fair law and will follow it.

If your Honor please, there was one individual question that I had respecting Mr. Hill. Could I ask that of Mr. Hill?

The Court: You may question Mr. Hill.

Mr. Palmquist: Thank you, your Honor. Mr. Hill, I am not singling you out, but I notice you said you are president of a corporation.

Mr. Hill: That's right, sir.

Mr. Palmquist: I am new in this country, but will you tell me what corporation that is?

Mr. Hill: Prescott Industrial Foundation.

Mr. Palmquist: Was there another company?

Mr. Hill: No. I mentioned Mr. Wilmer's firm representing my employer.

Mr. Palmquist: Who are your employers?

Mr. Hill: Arizona Public Service Company.

Mr. Palmquist: Is that the power company?

Mr. Hill: Yes, sir.

Mr. Palmquist: In what capacity are you with the power company?

Mr. Hill: Sales manager. [20]

Mr. Palmquist: Do you ever have anything to do with claims or injuries, presented to the power company as such, or ever have to get into a huddle with Mr. Wilmer, as such, on these things?

Mr. Hill: On rare occasions; not very often.

Mr. Palmquist: I don't know how to interpret your answer. When was the last time you were in such a huddle? I had in mind there was such an action just a short time ago, involving a death. Were you involved in that? Mr. Wilmer defended the action?

Mr. Hill: No, sir.

Mr. Wilmer: I have no recollection of any such action as Mr. Palmquist speaks of.

Mr. Palmquist: You are certain now—suppose you were in the position of my clients, would you be willing to let twelve, Mr. Hill, with your background—I have to rely on you on this now—sit and hear your case; twelve people of the same frame of mind and same background that you have?

Mr. Hill: I think I could be very fair about it.

Mr. Palmquist: If you found you had to return a verdict against Mr. Wilmer; that wouldn't cause you any embarrassment, as such?

Mr. Hill: No, sir.

Mr. Palmquist: You believe there should be equal and exact law for the small as well as the large? [21]

Mr. Hill: That is right.

Mr. Palmquist: Justice for all, regardless of their size, race color or religion?

Mr. Hill: I have no prejudice in the matter.

Mr. Palmquist: Thank you very much. I have no further questions.

Mr. Wilmer: Gentlemen, I am quite sure that

Mr. Palmquist didn't mean to mislead you; but I take it you all understand there is the issue of liability in this case, before the first one can be resolved—before we get into this question of damages. I want to ask you just one or two questions on that. Are there any of you gentlemen who feel you would be influenced in any degree in arriving at your verdict through sympathy? I mean by that, are any of you of the frame of mind, that you would feel that because two people had been killed, unfortunately in an automobile accident, that at some phase it would only be right to give their estate something, even though you might feel, in your hearts, the people who were killed had brought on their own deaths? I ask that question. I know we are all human; and I would like to know if any of you feel you would let consideration of those things turn you from reaching a conclusion you felt in your own good conscience you should reach? I take it from the silence of all of you, that in the event you are chosen as jurors, this case will be weighed abstractly and impartially and the [22] conclusion you reach will be that, which you believe, under the facts as you find them, and the law the Court gives you, is the conclusion you should reach.

We have no further questions.

Mr. Palmquist: If your Honor please, there is one question I feel I must ask, in view of the question he asked. Can I ask one more?

The Court: You may ask one question.

Mr. Palmquist: Thank you. Gentlemen, I would just like to know if there is anyone here who feels

the reason I am over here from California, or this lawsuit has been brought, is because of this thing that was called sympathy. My experience has been, there are two types of sympathy——

Mr. Wilmer: If it please the Court, I have been very lenient with counsel. I object to any further conduct of that course.

The Court: Counsel is now making a statement. If you want to stop with the question that you asked.

Mr. Palmquist: I meant to lay foundation, if your Honor please, for the question that has been asked. I think I can get at it this way. Gentlemen, sympathy is a two-edged sword. You can feel just as sorry for a person that owes a bill and doesn't want to pay it, as a person that is trying to collect the bill. Is there anyone that would allow any of that kind of sympathy in the case? That was my question. [23] I take it that the failure to raise your hands, you are not going to allow any of those kinds of emotions to enter.

We have no further questions.

The Court: Give the list to counsel.

(Jury list handed to counsel.)

The Court: In just a moment, Gentlemen, the clerk will call out the names of the twelve jurors who will sit in the trial of the case. As your names are called will you please stand and remain standing until you have taken the oath.

(Jury called and sworn.)

The Court: The jurors in the box who are not

going to sit in the case will retire to the body of the courtroom, please.

You may proceed with your statement.

Mr. Wilmer: Before proceeding with the statement I would like to invoke the rule.

The Court: Very well. All witnesses in this case will please come to the clerk's desk.

Mr. Palmquist: Does that include the daughters, who will be witnesses?

The Court: They should come up and be sworn.

Mr. Scoville: We have witnesses who have been asked to report in the afternoon and who are not here.

Mr. Wilmer: We are in the same position, your Honor, [24] but these witnesses will be kept out of the courtroom.

The Court: Counsel will have the obligation of keeping all witnesses out of the courtroom, who have not been sworn.

(Witnesses sworn.)

The Court: What is known as the rule, has been invoked; and that means that all witnesses in the case other than the parties must remain outside the courtroom at all times when testimony is being taken in the case. It means also that while you are outside and while you are waiting to testify, you are not to discuss with anybody other than the counsel, the lawyers in the case, the testimony you are going to give. It means further that after you have testified and after you have retired again from the courtroom, you are not to discuss with anyone

other than counsel, the testimony you have given. In other words, you are not to discuss your testimony in the case, with anybody other than counsel, either while you are waiting to testify or after you have testified. The bailiff will find places for you outside the courtroom, and you will be called in as you are needed.

You may proceed.

(Opening statement by counsel for plaintiff.)

(Opening statement by counsel for the defendants.)

The Court: Gentlemen of the jury, it is almost noon; so, at this time, we will take the customary recess until 2:00 o'clock this afternoon. Please be back promptly at [25] that time. And during the recess, and all recesses and adjournments throughout the trial, don't discuss the case among yourselves or with anybody else; and don't make up your minds about the case until it is finally submitted to you for your deliberation to begin. Those are important admonitions. In other words, don't discuss the case among yourselves or with anybody else and don't make up your minds until the case is finally submitted to you for your deliberation to begin. You can appreciate that the evidence will come in, in stages; you can't know the whole case until all the evidence is in. And, even when all the evidence is in, you haven't had the benefit of arguments of counsel or the Court's instructions. You can see how improper and wrong it would be to try

to come to a conclusion in the case before it is submitted to you for your deliberations to begin. With those admonitions which I ask you to bear in mind throughout the trial, we will stand at recess until 2:00 o'clock.

(Jury retires from the courtroom.)

The Court: Let the record show the jury is now entirely withdrawn from the courtroom. Does counsel have some stipulation?

Mr. Wilmer: Yes, your Honor, with respect to the issues made by the pleadings, the defendant, Ripka, and the defendant, Wilson Brothers Trucking Company, does not contest the issue, first, as to agency. In other words, we admit, at [26] the time of the accident, the defendant, Ripka, was an employee of Wilson Brothers Trucking Company, acting within the scope and course of his employment. Two: with respect to the question of the causation of the two deceased persons, we concede that their death was caused in the accident and as a result of the accident. Is that sufficient? And as a proximate result of the injuries sustained in the accident.

Mr. Palmquist: I do wish to reserve, however, the right to comment on the lateness of the stipulation as to agency.

Mr. Wilmer: We can meet that issue, if counsel desires to do so.

Mr. Palmquist: There is just one thing I would like to ask, if your Honor please. I have these daughters of the family with me. They are very much concerned in learning what happened. They

are actual witnesses to the accident, in that they were in the car, but they do not know what happened. They will not be eyewitnesses as such. I don't know, I am in a foreign country here. In my country we would allow them to stay in the courtroom. They are the real parties in evidence. I don't even know who this Wanek is; but my Arizona friends and associates tell me that is the only way the action could have been brought. In our country we could have brought it in the names of the daughters, as heirs of the estate. They are the real parties in interest. [27]

The Court: In our practice, when the rule is invoked, I exclude everybody but the parties. In the case of a party who is represented, such as a corporation or deceased's estate, I permit them one of the officers of the corporation or administrator or executor to be present.

Mr. Palmquist: To me it seems cruel, because Mr. Ripka is sitting here; and they are the daughters, they merely want to hear the testimony. The only thing they will have anything to testify about will be the damage question.

The Court: I suppose, Mr. Palmquist, you could argue——

Mr. Palmquist: Will you stipulate to that, Mr. Wilmer?

Mr. Wilmer: It is my position, if it please the Court, the mere parading of the minor children in the courtroom, unless they have some substantial testimony to offer with respect to the issues is preju-

dicial under the rule laid down in the case of Western Truck Lines vs. Barry.

The Court: We have that case in the State Court. However, if you are going to have the rule you can have it. If the Court goes to making exceptions in every case on this reason and that reason, pretty soon the Court is doing nothing but settling things like that. I follow the practice of having the rule and if counsel want to stipulate, that is all right, but in the absence of that, I will apply it to both sides.

Mr. Palmquist: Well, I beseech counsel to stipulate—[28]

Mr. Wilmer: I will not stipulate to something I consider to be prejudicial error in our jurisdiction, Mr. Palmquist.

Might I ask the Court, simply for the purpose of avoiding gilding the lily—I know it is your Honor's custom—I have been told it is your Honor's custom to largely prepare your own instructions, or at least that you have a set of stock instructions which, if you find nothing new in counsel's instructions, you follow.

The Court: I prepare all the stock instructions. Basically I use the California jury instructions to outline the issues and so on. If counsel has anything special——

Mr. Wilmer: I was interested, primarily, in the stock instruction your Honor gives on contributory negligence.

Mr. Scoville: Prior to Mr. Wilmer's arrival this morning, Judge Walsh asked me if I had in-

structions, which I submitted. I have a copy for you too. Do you have some?

Mr. Wilmer. I have not prepared them.

Mr. Palmquist: We will exchange instructions with you when you have them.

Mr. Wilmer: Might I inquire of the Court, if the Court has a stock instruction on wrongful death action?

Mr. Scoville: I just lifted the one out of the Ninth Circuit, almost word for word.

The Court: Jones against Weaver case in the Ninth [29] Circuit.

Mr. Scoville: It is two deaths, just an identical situation.

The Court: I have given that one with the definition of present value of probable accumulations of the decedent.

Mr. Wilmer: That was what I was concerned with, your Honor, because there had been some variation in the State Court with respect to the instruction. I was interested in knowing whether I should prepare one.

The Court: If you will look at the last one of counsel's I will give it plus a definition of present value of the probable accumulations of the decedents.

Mr. Wilmer: Since counsel has refused to supply me with a copy——

Mr. Palmquist: We haven't refused. We are merely asking what we are entitled to, a copy of your instructions; then we will give you a copy of ours. That is all. No one has refused anything.

Mr. Wilmer: Counsel must have misunderstood me. I was inquiring of the Court——

Mr. Palmquist: You stated to the Court we refused to give you instructions; that is not so. We want to exchange instructions.

Mr. Wilmer: I was asking the Court with respect to what instruction he proposed to give; the Court says that he [30] proposed to give a particular instruction which was submitted. I then said I hadn't had an opportunity to see it.

The Court: Jones against Weaver is in 123 Fed. 2d. at 403. As I recall, the instruction there is——

Mr. Scoville: I had lifted it almost verbatim out of that case.

The Court: Before we take up this afternoon, I will read to counsel—I take it there will be no actuarial testimony?

Mr. Scoville: We only propose to offer the mortality tables.

The Court: I will read the instruction I propose to give, where there is no actuarial testimony, and you can see if you want to worry with something else.

Mr. Scoville: Very well, your Honor.

(Whereupon, a recess was taken at 12:00 o'clock, until 2:00 o'clock p.m.)

SAMUEL HURLBERT

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Scoville:

Q. State your name for the Court and jury, please. A. Samuel Hurlbert. [31]

Q. Mr. Hurlbert, where do you reside?

A. Phoenix, Arizona.

Q. What is your occupation?

A. I am a civil engineer.

Q. Are you presently employed in that capacity as a civil engineer? A. Yes.

Q. And by whom are you employed?

A. Arizona Highway Department.

Q. The highway department of the state of Arizona? A. Yes.

Q. And you are employed in the capacity as civil engineer? A. Titled as designer.

Q. Designer? A. Yes.

Q. That is engineering design of roads and highways? A. Yes.

Q. Now, how long have you been engaged in the profession of civil engineering?

A. About—well, I have been in engineering work twenty-four years and highway work nineteen.

Q. And highway work nineteen years?

A. Yes.

Q. In some engineering capacity?

A. Yes, sir. [32]

(Testimony of Samuel Hurlbert.)

Q. You have some education in engineering?

A. Yes. I have a bachelor of science degree in engineering from the University of Nebraska.

Q. Since your graduation from college with your degree in engineering have you continuously practiced your profession in that regard?

A. Yes; continuously.

Q. Are you a registered civil engineer under the laws of the state of Arizona? A. Yes.

Q. How long have you been such registered civil engineer? A. Two years.

Q. Now, Mr. Hurlbert, at my request did you go within some time recently, I believe it was, to the area of U. S. Highway 66 at a point thereon approximately seven and one-half miles west of Flagstaff? A. Yes.

Q. At my direction, what did you do there?

A. I went up there and made certain the road was as designated on the plans of the Arizona Highway Department.

Q. You made a personal survey of the road?

A. Yes.

Q. And checked the accuracy of some maps or plans?

A. Yes. I checked the data up there on the ground.

Q. Subsequently, did you prepare for me a map or plat of [33] area of U. S. Highway 66?

A. Yes.

Mr. Scoville: May this be marked for identification?

(Testimony of Samuel Hurlbert.)

(Plaintiff's Exhibit 1 marked for identification.)

Q. (By Mr. Scoville): Mr. Hurlbert, referring to what has been marked Plaintiff's Exhibit 1 for identification, what is this instrument?

A. Well, this is the plan and profile of the area with all the engineering *data* concerning the construction of the highway as it now stands and as it has been since the year 1945.

Q. Now, you actually did your survey work there approximately when on the road?

A. On July 23rd.

Q. Of 1955? A. Yes; 1955.

Q. Now, do I understand from you that since the construction of that highway in 1945 there have been no changes in the roadbed or the structure of the highway itself with reference to its course and direction, elevation?

A. No. There has been no changes.

Q. There have been no changes. Then have you platted upon this exhibit, Plaintiff's Exhibit 1 for identification, the roadway in fact as it existed at the time of your survey and of the time of the preparation of this plat? A. Yes. [34]

Q. Did you check the various elevations?

A. Yes.

Q. Of the various points of the highway?

A. Yes.

Q. Is this to the best of your ability, in view of your years of education and years as a civil engin-

(Testimony of Samuel Hurlbert.)

eer, a true and accurate plat of the physical conditions with reference to the roadway on U. S. 66 at a point approximately seven and one-half miles west of Flagstaff, Arizona? A. Yes.

Mr. Scoville: We offer Plaintiff's Exhibit 1 for identification.

Mr. Wilmer: If the Court will pardon me just a moment.

We have no objection.

The Court: It may be received.

(Plaintiff's exhibit 1 marked in evidence.)

Mr. Scoville: The map having been received in evidence, with the Court's permission I would like to affix it to the board so that the witness might explain it. Can you see that? If you can't we will appreciate it if you will speak up.

Q. (By Mr. Scoville): Mr. Hurlbert, you have designated a section at the top of the map—what are the directions first of all to have been used in the layout, the usual map directions?

A. Yes. The north arrow thereon——

Q. Speak up so this last gentleman can hear [35] you.

A. The north arrow indicates the north; of course north, south, east and west (indicating).

Q. Now, to the east of this area you have labeled, "to Flagstaff," is that correct?

A. Yes.

Q. First of all, will you tell us or will you indicate and point to the jury the center line of the

(Testimony of Samuel Hurlbert.)

highway, if you have so indicated it at that point?

A. This is the center line of the highway here as indicated, an arrow pointing to this heavy line down the center.

Q. That with the two lines on either side of it is the highway? A. Yes.

Q. Now, of what is the center section of that highway composed, what is its construction?

A. The center section, this is a typical section taken on the curve proper here and it shows the center section of the roadway as twenty-two feet of concrete. In other words, concrete paving of twenty-two feet wide, eleven feet each side of center line. This road also has eight-foot mixed bituminous surfacing shoulders. They are eight feet wide. That makes a complete roadway of thirty-eight feet; and that would be nineteen feet each side of center line.

Q. Now, with reference to the eleven feet on each side of center line of the concrete, that is of what color, general color? [36]

A. That is a white color.

Q. And the bituminous is black?

A. The bituminous is generally black.

Q. You have indicated that the road—you have depicted here the curve and the road as it appears here? A. Yes.

Q. The curve on the highway is as depicted on your map?

A. Yes. This section here is a section taken on

(Testimony of Samuel Hurlbert.)

the curve. The curve begins here where you see this designation "T.S." and comes fully into the curve at the "S.C." This is what is called a spiral, that is an easement curve that eases the vehicle into the main curve. When you strike at this point you are into the main curve and you come into this super elevation, and from there on you are on the super elevation of the curve.

Q. The curve, you say, of the super elevation commences at the point you have designated as "S.C. 18"—

A. 27 plus 33.98. These designations are what we call engineering stations, and an engineering station is one hundred feet. So that the distance between here and this next mark here is one hundred feet. This is station 1822, 1824, 1825. That is used all over the country in designating distances on roadway plats.

Q. Now, you have also indicated some dash, dotted lines. What do these indicate? [37]

A. Those are right-of-way lines showing the right of way that belongs to the state of Arizona for the filling of the road.

Q. Now, below the highway you showed lines that you have labeled "Atchison, Topeka and Santa Fe Railroad." That is railroad tracks for the railroad right of way?

A. Yes. That indicates railroad tracks. This is the railroad and railroad right of way.

Q. And the Santa Fe tracks do adjoin this curve to the south, is that right? A. Yes.

(Testimony of Samuel Hurlbert.)

Q. Incidentally, what is the scale at which the top portion of the plat is drawn or highway or highway and of that curve?

A. This scale is one inch equals fifty feet.

Q. Approximately how many feet of highway, can you tell us offhand, is involved in the over-all curve?

A. In the over-all curve from here?

Q. The entire part of the road depicted.

A. The entire part of the map shown there?

Q. Approximately what?

A. Twenty-two hundred feet.

Q. Twenty-two hundred feet?

A. Thirty-seven and twenty-two—that would be seventeen hundred feet. It is fifteen hundred. Fifteen hundred feet [38] shown there.

Q. How much?

A. Fifteen hundred feet of the highway is shown there.

Q. Included in that drawing?

A. Yes.

Q. You have shown at approximately the middle of the plat, crossing the highway at right angles, some dotted lines and you have labeled them. Would you put your ruler on that point?

A. Right here?

Q. Yes. What is that, Mr. Hurlbert?

A. That is a concrete arch culvert. That is located at Station 1829 plus fifty. In other words, it is halfway between the two engineering stations.

Q. When you say concrete arch culvert, that is a culvert under the road for passage of water, is that right?

A. Yes.

(Testimony of Samuel Hurlbert.)

Q. Drainage? A. Yes.

Q. That culvert, you have to the right of the culvert, if I might point, on the north side a series of small dots look to be about fifty feet apart, or circles. You have one, two, three, four, five, six, seven, eight, nine and so on; and five on the north side. A. Yes.

Q. What are those little circles, what do they indicate? [39]

A. Those are guide posts which you see along the edge of the highway on curves and structures. And in this case they were white posts and they were located every fifty feet.

Q. Now, leave that plat for a moment. Have you explained rather fully what you have depicted on the top portion of the plat, is there something I have overlooked that is not explained?

A. I don't believe so.

Q. All right then, let me direct your attention to the figures before we go to the bottom of the plat, "Highway Curve," and there are a lot of figures there and numbers there. A. Yes.

Q. Are those the engineering facts with reference to the curve? A. Yes.

Q. What do they mean, briefly?

A. That is engineering data that tells you how to lay in the curve for construction purposes.

Q. You found the curve to be laid in that way?

A. Yes. One of the most important things is the curvature here. I went up there and checked it, and also checked all these reference points. And there

(Testimony of Samuel Hurlbert.)

are breast caps and markers out to the side and there are breast caps imbedded in the pavement here at different places which tell you the road was constructed as per plan shown. [40]

Q. Let me direct your attention to the bottom half of the map. You have drawn a line on a scale?

A. Yes.

Q. Will you explain to the jurors and Court what that line represents?

A. That line here is the elevation—is the line of the elevation of the center line of the roadway. And you can see here that the designation here is level; that means this designation here from the center line of the roadway is all the same elevation. In other words, it is completely level just like the top of that. That doesn't mean when you get over into here, 1831, you are well into the curve, you are way over on the curve. That doesn't mean—that doesn't give any indications of the edges of the road——

Q. Could I interrupt you? This doesn't give an indication of the bank of the curve?

A. That is right.

Q. Just the center line?

A. That is right.

Q. Elevation of the center line all the way through?

A. Yes; that is right. Now, this is station 1831, that is right here. At that point you began to rise and begin to come into this grade and you enter just about on this grade here about the end. And this is a vertical curve which eases you from one

(Testimony of Samuel Hurlbert.)

elevation into the next elevation, in other words, to [41] the rise.

Q. All right, if you will be seated for a moment.

(Plaintiff's Exhibit 2 marked for identification.)

Now, if I understand your testimony correctly, Mr. Hurlbert, what we have here, if we are traveling in an easterly direction—in a westerly direction rather—if we are traveling in a westerly direction from Flagstaff on this road we come downhill and a curve to our left, is that right?

A. That is right.

Q. We come downhill and a curve to your left?

A. Yes.

Q. If you are traveling away from Flagstaff going west.

A. If you are coming down the hill, yes, your curve would be to your left.

Q. You are coming downhill, and to your left.

A. Yes.

Q. If you are going toward Flagstaff or east then your curve is to the right? A. Yes.

Q. And on the flat here is the center line and begins to climb and gets down past the point which has been indicated here? A. Yes.

Q. I show you what has been marked Plaintiff's Exhibit 2 [42] for identification and ask you to look at that photograph for a moment. A. Yes.

Q. Do you recognize that picture? A. Yes.

Q. Of what is it a picture?

(Testimony of Samuel Hurlbert.)

A. It is a picture looking—it is a picture taken from this direction looking up the road.

Q. And do you recognize that picture as a true and accurate reproduction of the highway at that point and place and covering substantially the area represented by the plat? A. Yes.

Q. And did it so appear at the time you made this plat? A. Yes.

Mr. Scoville: We offer 2.

Mr. Wilmer: May I ask a question, please?

The Court: Surely.

Mr. Wilmer: Is this taken looking east or west, Mr. Hurlbert?

The Witness: That picture is taken looking east. It was taken from that direction looking this way on the map. In other words, toward Flagstaff. Here is your designation "To Flagstaff."

Q. (By Mr. Wilmer): Do I understand you to say, Mr. Hurlbert, that if I were standing at this end of the plat looking [43] east I would see a flat, level piece of road, then I would see a hill going up?

A. Yes.

Q. That is right? A. Yes.

Q. You say that accurately shows a flat piece of road and hill ascending without a change?

A. Yes, that shows a flat area here with a hill rising.

Q. It doesn't show to the eye at least, a flat road and then a dip and then a slight rise?

A. No.

Mr. Wilmer: If it please the Court, the witness

(Testimony of Samuel Hurlbert.)

has testified it is accurate and shows what the plat shows. As far as we are concerned I don't think it makes any difference, but plainly it doesn't show what we get right there.

Mr. Palmquist: If counsel is going to testify he should be sworn, your Honor.

Mr. Scoville: The witness testified, and I think what is perhaps confusing Mr. Wilmer, in the center line of the road it is level and on the outside there is a bank. I grant with counsel the perspective on this may look somewhat different than the engineering to our eye, it sometimes looks a little different, but he has testified this is the way the road looks when you look at it.

Mr. Wilmer: I think it is wasting our time and the [44] jury's time. They can look at it.

Mr. Scoville: Do you have any objection?

Mr. Wilmer: I object to it that it is not an accurate depiction of what the witness has testified that map shows.

The Court: It may be received.

(Plaintiff's Exhibit 2 marked in evidence.)

Q. (By Mr. Scoville): Referring to Plaintiff's Exhibit 2 in evidence, there is some question that has been raised whether there is a dip in the road. Would you care to explain whether or not you see any dip?

Mr. Wilmer: If it please the Court, the exhibit speaks for itself. The jury are perfectly competent to look at the picture to determine whether they

(Testimony of Samuel Hurlbert.)

see a dip in it or not. Whether the witness sees a dip in it, the picture speaks for itself and should be submitted to the jury for their examination.

Mr. Scoville: May I ask the witness to explain his testimony with reference to the map and picture; and I want to simply ask him with reference to the area appearing on his plat as level at the center line of the highway shown at the back of this picture, whether or not in the picture it appears to take a dip, and ask him whether or not he has any explanation of that as an engineer.

A. Well, sometimes——

Mr. Wilmer: Just a moment. I don't like to be constantly [45] arguing, your Honor, but if it appears to make a dip and there isn't any dip it isn't an accurate picture.

The Court: The objection will be sustained. As to what the picture shows, the witness can state that.

Q. (By Mr. Scoville): On the basis as to what the picture shows, there is apparently a vehicle on this road. Whereabouts would that vehicle be on the plat? Can you point it out to us?

A. It appears to be approximately down in here somewhere, as near as I can tell. It looks to be right in here (indicating).

Q. All I am trying to get from you are the facts, Mr. Hurlbert, that is whether or not there is a decline in the elevation at the center line of the highway at that point, actually is there?

(Testimony of Samuel Hurlbert.)

Mr. Wilmer: If it please the Court, I have objected, the Court has sustained it. Either that is a correct depiction of the highway as it appears from that plat or it is not. It isn't up to this witness to weigh why it isn't accurate.

Mr. Palmquist: No; we confess no inaccuracy at all, none at all.

Mr. Wilmer: I ask the Court to look at it then. It is for the jury to look at that picture and see if it is accurate. It isn't for this witness to reconcile the picture [46] to the plat.

(The last question was read.)

The Court: He may answer that question.

The Witness: There is no decline or dip at that point.

Mr. Scoville: May I let the jury examine the exhibit?

Mr. Wilmer: We have no objection to that, your Honor.

Q. (By Mr. Scoville): Now, Mr. Hurlbert, at my request you also prepared an additional plat, did you not? A. Yes.

Q. Was that plat prepared of the same area?

A. Yes.

(Plaintiff's Exhibit 3 marked for identification.)

Q. (By Mr. Scoville): I show you what has been marked Plaintiff's Exhibit 3 for identification. Do you recognize this plat? A. Yes.

Q. And by whom was it prepared?

A. It was prepared by me.

(Testimony of Samuel Hurlbert.)

Q. And of what is it a layout or drawing?

A. It is a portion of the highway as shown here, as shown on this drawing.

Q. And by "this" you mean Exhibit 1 in evidence? A. Yes.

Q. Now, on what scale is this drawn?

A. This is drawn one inch equals three feet. [47]

Q. And would you show me precisely what section of the highway as shown on Exhibit 1 you have reproduced on Exhibit 3? Can you show me the area covered?

A. Yes, sir. This covers this area from here to about here (indicating).

Q. Now, for the record, is the area with reference to the culvert, where does it include the culvert? A. Yes, it includes the culvert.

Mr. Wilmer: May we have it marked on there, your Honor, so in the future we can know what he is referring to instead of just "here" and "there"? Can we put an X, Y or Z or something?

Mr. Scoville: Be happy to, certainly.

Q. (By Mr. Scoville): Will you tell us approximately by making a "X" at the east end of the enlargement and a "X" at the west end?

(Witness indicates on diagram.)

Q. Between the two X's on either side of the south side of the road, on either side of the culvert, you have enlarged that area, have you?

A. Yes.

Q. And it includes what, the pavement itself?

(Testimony of Samuel Hurlbert.)

A. Yes, it includes the pavement and the culvert and the guideposts.

Q. And it is to scale of one inch equals three feet, is [48] that correct? A. Yes.

Mr. Scoville: We offer 3.

Mr. Wilmer: May I ask a question?

The Court: Yes.

Q. (By Mr. Wilmer): How many feet lengthwise does this cover, Mr. Hurlbert?

A. That covers about two hundred fifty feet.

Mr. Scoville: I might say to the Court, we are offering this plat for subsequent use by the witnesses and an enlargement. The other is so small itself.

Mr. Wilmer: May I ask a further question?

The Court: Yes.

Q. (By Mr. Wilmer): In this area, Mr. Hurlbert, is there a large area which is not cement but which is shown in here as cement in the highway?

A. I don't believe so, but I can't be certain about that. There is a patch, a dark colored patch over the culvert.

Mr. Wilmer: Well, I assume counsel is offering this as being the area of the accident; I have proceeded on that basis.

Mr. Scoville: Yes, that is true.

Q. (By Mr. Wilmer): Mr. Hurlbert, are you certain this area you have shown us as Portland cement is cement in fact all the way through here? Did you make any examination to [49] determine that?

(Testimony of Samuel Hurlbert.)

A. I didn't examine. I didn't go underneath that black area to see.

Mr. Scoville: I didn't understand.

The Witness: I didn't go under the black area to see if that was concrete. However, I took elevations across that area and the elevations were as per stated on the——

Q. (By Mr. Wilmer): No, I am not questioning that, Mr. Hurlbert; I am asking you if in this area there isn't a large piece of the pavement, some twenty-five or thirty feet, which isn't cement but has been replaced by bituminous black top?

Mr. Scoville: The witness answered it was patched by black top; he didn't know how far the black top went but there was a bituminous patch in the pavement.

The Court: He may answer that.

The Witness: What was the last question?

(The last question was read.)

Q. (By Mr. Wilmer): In other words, if you drove over this highway you wouldn't see solid cement but you would see an area that was black top?

A. That is right; you would see an area about twenty-five or thirty feet which is black top.

Q. That has not been shown on there?

A. No; that isn't shown on there.

Q. Do you have any way of placing it on here so this would [50] accurately show what that is?

A. It would be placed on there, approximately.

(Testimony of Samuel Hurlbert.)

Mr. Scoville: We would be perfectly willing to have him place it on.

Mr. Wilmer: If he could do it I think we should have it accurate. We would have no objection to Mr. Hurlbert doing that at his convenience.

Mr. Scoville: Mr. Hurlbert, it would only take a moment to outline the area where the black patch is over the culvert?

The Witness: Yes.

Mr. Scoville: We can do that. Does counsel have any objection to the offer?

Mr. Wilmer: I would like to have it complete before it is received.

The Court: You may step down and put that on there.

The Witness: Do you have any objection to my looking at the photograph?

Mr. Wilmer: I had assumed he had notes or something else. If he is going to rely on the picture we had better rely on the picture. If he can indicate where it is, we can look at the picture.

The Witness: I can indicate it approximately.

Mr. Wilmer: That is all right.

Mr. Scoville: Just from your memory, approximately [51] where it lies. Outline it, please.

Mr. Wilmer: I would prefer if he would indicate the area and let the pictures speak for themselves.

The Witness (Indicating): I think that is approximate.

Mr. Scoville: Now, we offer Plaintiff's Exhibit 3.

(Testimony of Samuel Hurlbert.)

Q. (By Mr. Wilmer): This area you have drawn there, is that from your memory or do you have any accurate way of arriving at how much it represents?

A. Well, that wasn't drawn from memory; it is an enlargement of this——

Q. I am speaking of the area I suppose you have indicated as being the black top area.

A. Well, yes; that is drawn from memory and it is only approximate.

Mr. Wilmer: With that understanding we have no objection.

The Court: It may be admitted. The record will show the black top area the witness has been speaking of is marked by two crayon lines, two black crayon lines.

(Plaintiff's Exhibit 3 marked in evidence.)

Mr. Scoville: With the Court's permission, might I set this down here, only for the purposes of holding this long exhibit? I am using this for a back, something to hold it against.

Q. (By Mr. Scoville): Mr. Hurlbert, I wonder if you would [52] step down to Exhibit 3? Again the top of this plat is indicated as north?

A. Yes.

Q. Would you point to the culvert you have referred to in your testimony a few moments ago?

A. The culvert here, dotted lines.

Q. You said the dotted lines represent what?

A. The dotted lines represent the location of the culvert.

(Testimony of Samuel Hurlbert.)

Q. You have labeled the north shoulder of the highway as mixed bituminous surface, the same on the south? A. Yes.

Q. These are the distances you referred to a few moments ago? A. Yes.

Q. Eight-foot shoulder on an eleven-foot concrete highway? A. Yes.

Q. To my right, standing with the map, you have labeled "To Williams"? A. Yes.

Q. And the other direction, "To Flagstaff"? A. Yes.

Q. That is all in proportion to the scale of one inch equals three feet? A. Yes.

Q. Counsel wanted you to indicate that part of the [53] concrete you said was covered with some black patching, you didn't know how deep it was. The record shows over the area of the culvert; the record shows you have made two black crayon lines? A. Yes.

Q. Indicating the general area of the patch on the white concrete? A. Yes.

Q. Would you indicate to the jury just where those lines are? A. Right here and here (indicating).

Q. You have again labeled "guideposts" on the north side of the highway? A. Yes, sir.

Q. Those guideposts are approximately how far apart, what distance? A. Approximately fifty feet apart.

Q. All right; you may be seated. Do you recall the placement of any signs at the general location

(Testimony of Samuel Hurlbert.)

of the culvert with reference to the direction of traffic?

A. You mean—what do you mean now?

Q. As to the position traffic shall keep on the highway? I don't want to lead you.

A. Yes, sir; there was a sign in the neighborhood of the culvert. [54]

Q. Will you show us approximately where?

A. Approximately in here somewhere; I don't know exactly.

Q. You might make a mark and put "sign."

(Witness indicates.)

Q. Do you recall the designation, what the sign says? If you do, Mr. Hurlbert? If you don't, that is all right.

A. No, I don't recall the exact wording of the sign.

Q. Now, incidentally, the pointer I have given you for future use, we have a scale here, the only scale showing on this is one inch equals three feet, is that correct? A. Yes.

Mr. Scoville: You may cross-examine.

Cross-Examination

By Mr. Wilmer:

Q. This sign you speak of that you indicated here by a "1" with whatever it may be, that is an approximation?

A. Yes, that is only an approximation.

(Testimony of Samuel Hurlbert.)

Q. It could vary ten feet either way?

A. Yes, it could vary that much.

Q. One other question. This streak of highway here? A. Yes.

Q. Did you determine what is the bank of that highway, how much is the curve banked?

A. Yes.

Q. How much is it banked? [55]

A. Well, according to the engineering data the super is 0.054 per foot. That means for every foot you go out this way or every foot you go this way the highway is either lowered or raised by that distance.

Q. Excuse me. I am speaking now, tell me with respect to the culvert here. A. Yes.

Q. How much lower is this edge of the pavement than the north edge of the pavement?

A. Two feet.

Q. Two feet?

A. That is shown right here.

Q. As you follow through here, is that approximately the same bank to the curve?

A. That is right.

Mr. Wilmer: That is all.

Mr. Scoville: That is all.

ROBERT MARTIN FRONSKE

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Scoville:

Q. State your name, please.

A. Robert Martin Fronske. [56]

Q. Your business is what?

A. Photography.

Q. I believe you are a commercial photographer?

A. Yes.

Q. You have a place of business in Flagstaff?

A. Yes.

Q. How long have you been engaged in the photography business?

A. About sixteen years.

Q. How long have you maintained a commercial establishment in Flagstaff?

A. About that long.

Q. Your place of business is where?

A. 21 East Aspen in Flagstaff.

Q. You have been there almost sixteen years?

A. Yes, sir.

Q. That is your livelihood is commercial photography, is that right? A. Yes.

Q. During the course of that time you have done all sorts of commercial photography, have you?

A. Yes.

Q. Including photography of scenes, landscapes, as well as of persons and people?

(Testimony of Robert Martin Fronske.)

A. Yes. [57]

Q. And at my request in July, 1955, or at the request of an associate of my office, did you go to an area approximately seven and one-half miles west of Flagstaff and there make some pictures?

A. Yes, sir.

Q. Do you recall approximately what date that was?

A. It was about the 12th, I believe.

Q. About the 12th of July, last year?

A. Yes, sir.

Q. You then, after making those photographs, supplied me with prints from the negatives, is that correct?

A. That is correct, sir.

Q. Also on that same date, did you have occasion to photograph a Hudson automobile and also a truck?

A. Yes, sir.

Q. In Flagstaff, that had then been removed to Flagstaff?

A. Yes, sir.

Q. Where did you photograph the automobile, the Hudson, I believe it is.

A. It was in Caffey's Used Car or Wrecked Car Shop, I think.

(Plaintiff's Exhibits 4 to 12 marked for identification.)

Q. (By Mr. Scoville): I show you first of all two photographs which have been marked Plaintiff's Exhibits 4 and 12. Do you recognize those photographs? [58]

A. Yes, sir.

Q. And by whom were they taken?

A. By me, sir.

(Testimony of Robert Martin Fronske.)

Q. Were those the pictures taken by you at the time referred to, at the time you went out to the scene seven and one-half miles from Flagstaff?

A. Yes, sir.

Q. Do those pictures reflect, to the best of your ability as a photographer, the conditions as they appeared to the eye at that time and place?

A. Yes, sir.

Q. These are straight enlargements from the negatives? A. That is correct.

Q. Without any retouching, anything of that sort? A. Yes, sir.

Mr. Scoville: We offer these two, Plaintiff's Exhibits 4 and 12.

Q. (By Mr. Scoville): I show you a series of photographs which are Plaintiff's Exhibit 9, Plaintiff's 10, Plaintiff's 5, Plaintiff's 7, Plaintiff's 8. Would you examine those, please, and in each instance of what are they a picture?

A. They are a picture of the Hudson taken from different angles.

Q. Of the Hudson automobile?

A. Yes, sir. [59]

Q. On approximately July 12th at the garage in Flagstaff? A. Yes, sir.

Q. In each instance do these, to the best of your ability, reflect true and accurately the conditions as then appeared with reference to the automobile and with reference to the material covered by the picture? A. Yes, sir.

Mr. Scoville: We offer the 8, 7, 5, 10 and 9.

(Testimony of Robert Martin Fronske.)

Mr. Wilmer: May I ask a question, if it please the Court, with respect to plaintiff's offer of 12 and 4, of the witness? I wasn't sure, when did you say you took these pictures?

A. I believe it was about the 12th of July, sir.

Q. (By Mr. Wilmer): Of what year?

A. Last year.

Q. 1954? A. Yes, sir.

Q. Now, do you have any knowledge yourself whether the conditions you saw here were the same as the conditions that existed at the time of this accident?

Mr. Scoville: If your Honor please, I think I will withdraw these offers until they are connected later on, if you wish that objection——

Mr. Wilmer: I haven't made an objection. I was trying to find out if there was a basis for an objection. [59-A]

Mr. Scoville: This witness was not at the scene prior to that time. In order to save time we will at this time withdraw the offer until the pictures are connected up; as well as withdrawing the offer of the last four just referred to.

The Court: You offered five, did you not?

Mr. Scoville: Five. Yes, five pictures of the sedan.

The Court: Being Exhibits 5, 7, 8, 9 and 10?

Mr. Scoville: Yes. We will not make the offer at this time.

The Court: Very well.

(Testimony of Robert Martin Fronske.)

Q. (By Mr. Scoville): I show you Plaintiff's Exhibits 6 and 11. Of what are they a picture?

A. That was an automobile parked behind the garage, Hutchison Motors, on the same day.

Q. July 12th, 1954? A. Yes.

Q. Is it also true in these cases these photographs correctly and accurately reproduce the material shown in the photograph as appeared to the human eye? A. Yes, sir.

Q. To the best of your ability as a commercial photographer? A. That is right.

Mr. Scoville: We do not offer these at the time. That [60] is all the questions we have of this witness.

Mr. Wilmer: Will the Court pardon me just a moment?

Cross-Examination

By Mr. Wilmer:

Q. Were these all the pictures you took, Mr. Fronske? Did you take some additional prints besides these? A. Yes, sir.

Q. What happened to those?

A. I don't know; they weren't submitted. I guess.

Q. You did take additional pictures which have not been produced here? A. I believe so.

Q. How many? A. I don't know, sir.

Q. Quite a substantial number?

A. I wouldn't say any great number.

Q. Do you have any idea?

(Testimony of Robert Martin Fronske.)

A. There was a few more of the truck, I believe.

Q. How many?

A. I believe I took a couple of the back of the truck—no, I took pictures of each door of the truck.

Q. Take any more pictures of the Hudson sedan?

A. No, sir; I think that is about all I took of that.

Q. Do you have any record to show how many you took?

Mr. Scoville: Mr. Wilmer, I have some more here if you [61] want them. We offer them all.

Mr. Wilmer: We would expect them to be properly identified, your Honor. If counsel will identify them we will examine them and be happy to accede if they are identified.

Mr. Scoville: They are repetitious and don't pertain to these issues, but I will offer them to counsel and he can have them marked if he wants to.

Mr. Wilmer: No; I am asking the witness if there are additional pictures, if so, how many?

The Witness: I think they are there.

Q. (By Mr. Wilmer): Do you have any record of how many you took?

A. I have them at home, yes, sir.

Q. You didn't bring that with you?

A. No.

Q. With respect to Plaintiff's 11 and 6, I assume the witness will want to be excused and I would like to ask a question. What do they purport to be a picture of?

A. As I remember, they wanted to show——

(Testimony of Robert Martin Fronske.)

Q. What portion of the vehicle?

A. It is the bumper of the truck; the front bumper.

Q. This truck was where at the time?

A. It was parked behind the Hutchison Motors.

Mr. Wilmer: That is all.

Mr. Scoville: If the Court please, there are so many [62] photographs I may have overlooked one. May this be marked for identification?

(Plaintiff's Exhibit 13 marked for identification.)

Q. (By Mr. Scoville): Mr. Witness, did you take this picture?

A. Yes, sir; I believe I did.

Q. I think that is yours.

A. I think that is right.

Q. Now, what, if any, part of the area of the highway in question does that cover?

A. Well, that looks like the point of impact.

Mr. Wilmer: Just a moment. I move to strike the answer as not responsive.

The Court: It may be stricken and the jury will disregard the last answer of the witness.

Q. (By Mr. Scoville): Do you recall a patch of black top on the area you examined out there when you photographed it, black top on the concrete?

A. Yes, sir.

Q. Is this a photograph of that area?

A. That is correct.

Q. Did it truly and accurately depict the condi-

(Testimony of Robert Martin Fronske.)

tions with reference to the material shown in this photograph on the morning of the 12th of July, 1954, when you made the picture? A. Yes, sir. [63]

Mr. Scoville: We offer Plaintiff's Exhibit 13.

Mr. Wilmer: We make the same objection, your Honor. It is a picture made some two days later with no showing it has any probative value with respect to the time of the occurrence some two days earlier.

Mr. Palmquist: Counsel has raised some objection to that black top. We have now found him a picture.

Mr. Wilmer: Counsel knows it isn't offered for that purpose. It is offered for something for which a foundation has not been laid.

Mr. Scoville: We offered it for the purpose of showing the black top area, and for whatever else it may show, of course. But it is certainly an orderly presentation with matters concerning the black top area over the culvert, and this is only two days later.

The Court: It may be received.

Mr. Wilmer: May it please the Court, do I understand it is being received for the purpose of showing the black top area, or for the purpose of showing anything with respect to the accident?

Mr. Palmquist: The black top area is the only reason we offered it.

The Court: All it shows is the highway at the point the witness has testified to and the pavement there. There is nothing else on it. [64]

(Plaintiff's Exhibit 13 marked in evidence.)

(Testimony of Robert Martin Fronske.)

Mr. Scoville: May we exhibit the picture to the jury?

The Court: Yes.

Q. (By Mr. Scoville): Now, Mr. Wilmer asked you about some other pictures you knew you had taken, some additional pictures. May these six pictures be marked for identification?

The Court: Separately or——

Mr. Scoville: I think as a group would save time.

The Court: Very well.

(Plaintiff's Exhibit 14 marked for identification.)

Q. (By Mr. Scoville): I show you a group of pictures just referred to. Are these the additional pictures you spoke of concerning pictures of the truck? A. Yes, sir; that completes it.

Mr. Scoville: We offer the additional group.

Mr. Wilmer: There has been no foundation laid, your Honor, to justify their admission.

Mr. Scoville: The only purpose in offering them is the purpose of taking away any innuendo that we are concealing any pictures. I don't think they are particularly material.

The Court: Objection sustained.

Mr. Scoville: That is all.

(Testimony of Robert Martin Fronske.)

Cross-Examination

By Mr. Wilmer:

Q. Before you told me, Mr. Fronske, you thought the only [65] pictures you took were some pictures of the truck; Mr. Scoville produced a picture of the highway which you then recalled as an additional picture you had taken. Are you sure now we have had produced all the pictures you took, are you positive?

A. No, I am not positive, not without checking my negatives.

Mr. Wilmer: That is all.

Mr. Scoville: That is all.

(Witness excused.)

ROBERT RUSSELL HARRIS

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Palmquist:

Q. Your full name is Robert Harris?

A. Robert Russell Harris.

Q. Mr. Harris, where do you reside?

A. I am stationed at the Navajo Ordnance Depot.

Q. What is your occupation?

A. I am a soldier.

Q. How long have you been a soldier?

(Testimony of Robert Russell Harris.)

A. Will be twenty years in October.

Q. Are you a married man? A. Yes, sir.

Q. What is your wife's name? [66]

A. Edith Harris, sir.

Q. What is Mrs. Harris' occupation?

A. She is a professional nurse, sir.

Q. Do you folks have children?

A. Yes, sir.

Q. I want to call your attention to the 10th day of July of last year, 1954, at a point approximately seven and one-half miles west of Flagstaff. Were you on that road on that day at about 3:00 o'clock a.m.?

A. Yes, sir.

Q. Where were you coming from at that time?

A. My wife was working in the hospital at Flagstaff and I had gone down to bring her back home.

Q. Would you keep your voice up; everybody has to hear this?

A. All right, sir.

Q. What was the name of the hospital where your wife was working as a nurse?

A. It was the Doctors Hospital in Flagstaff, sir.

Q. The Doctors Hospital? A. Yes, sir.

Q. As you drove west, you were driving on Highway 66, were you?

A. Yes, sir.

Q. Is that a two or more lane highway?

A. It can be made into a four-lane highway, but it is a [67] two-lane highway, sir.

Q. It is a two-lane highway?

A. Yes, sir; I would think so, yes, sir.

Q. Does it have a center line down it?

A. Yes, sir.

(Testimony of Robert Russell Harris.)

Q. And the highway there runs generally in what directions?

A. Well, northeast and southwest, I believe, sir.

Q. As you drive from Flagstaff out to this point we have been talking about seven and one-half miles west of Flagstaff; would you tell his Honor and the gentlemen of the jury how many turns approximately, or what kind of a road is it, whether it is mountainous or not?

A. Sir, it is rather hilly and there are quite a few curves in it.

Q. Quite a number of curves, is that correct?

A. Yes, sir.

Q. What were the weather conditions as you came along there that night?

A. It was cool, sir, but the weather was nice.

Q. Was it clear? A. Yes, sir.

Q. Was there any ice on the road, anything like that? A. No, sir.

Q. Was the pavement dry?

A. Yes, sir. [68]

Q. There was no fog, anything of that nature to hinder visibility? A. No, sir.

Q. What was the first thing you observed, if you did observe such a thing, that was out of the ordinary as you came along there that night?

A. We started around this curve and down the hill and I saw some lights that were—I don't know how far it was away, sir, but then I slowed down and there was a gentleman, I don't know who he was, with a flashlight waving it up and down. So

(Testimony of Robert Russell Harris.)

we stopped and I asked him what had happened; he said, "There is an accident up ahead." And I said, "Is anybody hurt?" He says, "There is quite a few people in one of the cars up there and they seem to be in pretty bad shape." I said, "My wife is a professional nurse; I will go on down." So then I drove on down past the car; did a U turn and flashed my lights back into the side of the car.

Q. Was that the Hudson, when you say the car?

A. Yes, sir; the car that was in the accident, sir.

Q. Where was that Hudson on the highway?

A. It was on the north side of the center line, sir, on a black top there, sir.

Q. There was some black top there?

A. Yes, sir.

Q. And where would the rear end of the [69] car be?

A. Well, it would be, I know one wheel of the rear end of the car was off of the one lane on the one side.

Q. And how far would the front end of the car be from the center line?

A. I would say at least four feet, sir.

Q. At least four feet? A. Yes, sir.

Q. Did that car appear to have been in an accident? A. Yes, sir; that it did, sir.

Q. What portions of that car appeared to have been damaged?

A. Well, it was the left side and the front end of it was especially damaged, the left side. That is standing at the rear of the car, the driver's side.

(Testimony of Robert Russell Harris.)

almost all the front end and right on through where the driver sat.

Q. And you say the people were still in the car?

A. Yes, sir. There were at least four people in the car. I think one of the children was standing on the outside. I am pretty sure one of the children was standing on the outside, sir.

Mr. Palmquist: May I have this marked for identification, please?

(Plaintiff's Exhibit 15 marked for identification.)

Q. I am going to show you a picture—there is some typing on the back of this which I will take off—and I will [70] ask you whether or not you can recognize that picture?

A. That's a picture of the car that was in the accident.

Q. Is that the car you were talking about?

A. Yes, sir.

Q. Could you tell this jury and this Court whether or not that is a correct representation of the position of that car before it was moved?

A. As near as I can see from here, yes, sir. But I can't see the center line so, therefore—but this is the automobile and in the position I would think it was in, seeing it at night, sir.

Q. Yes. Would that be about the view you had as you swung your lights onto that car?

A. No, sir. I didn't put my lights on the side of the car here; I put them on the other side.

(Testimony of Robert Russell Harris.)

Q. On the opposite side?

A. Yes, sir; I was on the north side of the highway shining my lights into the right side of this automobile.

Q. Does that accurately portray the damage you saw to that Hudson car that night?

A. I would say yes, sir.

Q. And did you learn, as you were around the scene of the accident, that that car had been pulling a two-wheel trailer?

A. Yes, sir, a trailer. I don't remember whether it was a two-wheel trailer but I do know it was pulling a trailer. [71]

Q. And did you find a tarpaulin such as is thrown over such trailer?

A. Well, sir, I observed something but I didn't know whether it was a blanket or tarpaulin or what.

Q. Or canvas?

A. Yes, sir; it was some kind of canvas or blanket.

Q. Do you see that canvas, tarpaulin or blanket we are talking about in that picture?

A. Yes, sir.

Q. And it shows it hanging on the left side of that Hudson, does it?

A. Yes, sir.

Q. Now, did you find scattered in the wreckage of that Hudson on the left side any other things that had come from other than parts of that automobile?

A. There was some debris, I imagine, that came from the trailer, and some glass right down beside the car.

(Testimony of Robert Russell Harris.)

Q. Did you find some personal belongings, for example?

A. Not on that side. I found them off on the other side of the highway on the north side of the center line, off the highway completely. And there were some papers scattered on the highway, too.

Q. This picture of this car in this position is on the north side of the highway, is it not?

A. Yes, sir. [72]

Q. Did you, as you drove down there that night, did you actually drive by this car?

A. Yes, sir.

Q. In which lane of travel did you go to go by that car? A. In the south lane, sir.

Q. Did you have to run over any personal property or debris of any kind in that lane of traffic?

A. Not that I remember, sir.

Q. Did you see any such debris?

A. No, sir.

Q. Did you see such debris, however, in the west-bound lane of traffic or north of the center line?

A. Yes, sir; there was glass and other debris, yes, sir.

Q. Did you find—did you see any children's toys scattered out there any place?

A. Yes, sir; there was doll carriages and other things like that.

Q. Did you see any paper napkins of any kind?

A. Yes, sir; I saw some paper napkins that were probably used for a birthday or party of some sort.

(Testimony of Robert Russell Harris.)

Q. Why do you say they were used for a party of some sort?

A. Well, most of the time when you go on a picnic or something you generally take napkins with you.

Q. You said birthday; did these napkins say, "Happy birthday," do you recall? [73]

A. There were some that said, "Happy birthday," and there were other napkins along, too, sir, paper napkins.

Q. As you look at that picture, can you also see there the edge of a black asphalt area you have spoken about?

A. Yes, sir.

Q. I will call your attention to a picture which is already in evidence and which was taken—I am referring to Plaintiff's Exhibit 13—and do you recognize that black patch across the culvert?

A. I would presume it is the same one, yes, sir.

Q. Does it look to be the same?

Mr. Wilmer: Just a moment. This witness is able to testify, your Honor. Presumptions are of no consequence to us.

The Court: The objection is sustained.

The Witness: Looking at the picture I would say it is the same one.

The Court: Mr. Harris, I have sustained the objection. Counsel will have to ask another question.

The Witness: Sorry, sir.

Q. (By Mr. Palmquist): How long have you lived in that region?

A. I was up there one year this past November.

Q. You have been there a year then?

(Testimony of Robert Russell Harris.)

A. Yes, sir. I have been there two years this coming November. [74]

Q. Two years this coming November?

A. Yes, sir.

Q. Can you recognize that as the highway where this accident occurred? I am referring to that one——

A. Yes, sir.

Q. I am referring to Plaintiff's Exhibit 13 in evidence. Can you tell me what those black marks are on that highway that you see?

Mr. Wilmer: If it please the Court, we object to the witness interpreting the picture. I don't know what he is referring to as "black marks" to begin with and, secondly, the picture itself speaks for itself.

Mr. Palmquist: Counsel, will you stipulate that is the black patch on the culvert? That is all I want to establish. It is the black patch on this culvert. Have you any doubt in your mind about that?

Mr. Wilmer: I believe the question was whether or not he could tell what the black marks were, if it please the Court, and I object——

The Court: He can answer if he knows.

The Witness: On this one right here——

Mr. Wilmer: Just a moment. Which one are you referring to? There is one not in evidence.

The Court: This is 13. It is in evidence.

Mr. Wilmer: We request the exhibit either be offered [75] in evidence, your Honor, or——

The Court: The counsel is asking now about one that is in evidence.

(Testimony of Robert Russell Harris.)

Mr. Wilmer: I agree, your Honor, and I have no objection to that.

Mr. Palmquist: May I proceed, your Honor? Thank you.

Q. (By Mr. Palmquist): Do you recognize that black patch in number 13, being the black patch across this culvert there? A. Yes, sir.

Q. In this picture you have been describing as being a true representation of what you saw that night, Plaintiff's Exhibit 15 for identification, can you see the edge of that black mark?

A. Yes, sir.

Q. And which edge of the black mark would it be? A. The northeast edge.

The Court: Counsel, don't inquire about the picture until it is offered. I think you are now getting into the matter Mr. Wilmer was objecting to a moment ago.

Mr. Palmquist: All right. Could I offer the picture at this time before the recess?

The Court: Counsel will want to look at it anyway and he can do that during the recess. We will take the afternoon recess for about ten minutes. During the recess please bear in mind the admonition heretofore given you.

(Recess.) [76]

Q. (By Mr. Palmquist): This Plaintiff's Exhibit 15, you have already testified that you see the tarpaulin or blanket, whatever it was there?

A. Yes, sir.

(Testimony of Robert Russell Harris.)

Q. And the damage to the car that you saw?

A. Yes, sir.

Q. And the position of the car in relation to the edge of the black top? A. Yes, sir.

Q. I am going to ask you one more question. This line running across there, do you remember what that was?

A. No, sir; I don't remember what that line was.

Q. But is this picture a true and correct representation of what you saw there the very night of this accident? A. Yes, sir.

Mr. Palmquist: We offer this picture in evidence at this time, if your Honor please, Plaintiff's Exhibit 15.

Mr. Wilmer: May I ask a question, please?

The Court: Very well.

Q. (By Mr. Wilmer): How long did you stay there when you first got there, Sergeant?

A. I stayed there approximately five minutes, then I went for an ambulance.

Q. Then you went back for an ambulance, then you returned? A. Yes, sir. [77]

Q. During the time you were there this five minutes the light that was there was the light from your car and the patrol car was there—had the patrol car arrived?

A. The patrol car hadn't got there at that time, sir.

Q. Did you make an examination of the vehicle at the time, the first five minutes you were there?

A. No, sir.

(Testimony of Robert Russell Harris.)

Q. This is an examination you made after you returned? A. Yes, sir.

Mr. Wilmer: We believe there has been a sufficient foundation laid, your Honor.

The Court: It may be received.

(Plaintiff's Exhibit 15 marked in evidence.)

Mr. Palmquist: Perhaps counsel will stipulate, without going through the same foundation, this was the second picture taken. It is a little closer view.

Mr. Wilmer: We are not prepared to stipulate, your Honor——

Mr. Palmquist: Very well.

Mr. Wilmer: Pardon me just a moment, Mr. Palmquist, please. I was addressing the Court. If I might complete I would appreciate it. We will not stipulate that picture is a correct representation. I do object to the additional offer and upon the ground it is without additional corroborative evidence, but I will agree the witness in question would [78] testify the same as he has testified to this picture here.

Mr. Palmquist: On that basis I will offer this one.

Mr. Wilmer: May I approach the bench?

The Court: What is the number of the picture?

Mr. Palmquist: I haven't had this marked—I will withdraw it and go about it properly.

The Court: Very well.

Mr. Palmquist: May I have this marked for identification? First I will withdraw the typing on the back of it.

(Testimony of Robert Russell Harris.)

(Plaintiff's Exhibit 16 marked for identification.)

Mr. Palmquist: May I have Plaintiff's Exhibit 15 in evidence?

Q. (By Mr. Palmquist): You have already identified Plaintiff's Exhibit 15 that is in evidence?

A. Yes, sir.

Q. And I would like to have you look at Plaintiff's Exhibit 16, and is that substantially the same view with the exception of a little different shutter speed and——

A. Yes, sir.

Q. And everything you told us about Plaintiff's Exhibit 15 would be true of Plaintiff's Exhibit 16 for identification?

A. Yes, sir.

Mr. Palmquist: We offer the picture in evidence, if your Honor please.

Mr. Wilmer: We have no objection. [79]

(Plaintiff's Exhibit 16 marked in evidence.)

Q. (By Mr. Palmquist): Now, Mr. Harris, did you also find there was another vehicle involved in that accident?

A. Nothing, only the trailer that was behind the Hudson.

Q. I meant another vehicle. Did you find what had struck this Hudson?

A. There was a truck on down—going east on Highway 66 toward Flagstaff.

Q. During the recess I showed you Plaintiff's Exhibit number 3 in evidence.

A. Yes, sir.

(Testimony of Robert Russell Harris.)

Q. And explained it to you. And I wonder if you could step down here and referring to Plaintiff's Exhibits 15 and 16, to refresh your memory, draw in first the position of the Hudson as you know it to be. The scale of this map, as I pointed out to you, is one inch equals three feet. And could I ask counsel through the Court if he would stipulate this Hudson would be approximately six feet wide and, say, approximately fifteen or sixteen feet in length?

Mr. Wilmer: I have no actual knowledge, but if counsel says that is true.

Mr. Palmquist: I don't know; I am just guessing.

Mr. Wilmer: I don't want to stipulate if I don't know, but if counsel is prepared to make the statement, it is true I will accept it. [80]

Mr. Palmquist: I will take counsel's statement on the length of the car.

Mr. Wilmer: I don't know.

Mr. Palmquist: I don't think it is material in the case, but for the purpose of drawing roughly to scale.

Mr. Wilmer: I have no notion; I assume it is approximately that size. I never measured one and I don't know.

Q. (By Mr. Palmquist): Would you draw this approximately in the position it was—by the way, before you do that, would you turn around and face the jury to answer this next question? Did you make some kind of a measurement of the distance

(Testimony of Robert Russell Harris.)

between the left-hand front corner of this Hudson and the center line?

A. No, sir; I judged it to be at least four feet on the north side.

Q. At least four feet? A. Yes, sir.

Q. Will you draw in roughly for us, and using this scale, if you want it six feet it is on there; if you want sixteen feet it is on there. Draw in the position, referring to these pictures to refresh your memory.

Mr. Scoville: That is the scale now.

Mr. Palmquist: In other words, if you want four feet, it is right on there.

Mr. Scoville: It is a scale.

(Witness indicates on diagram.)

The Witness: I would say that is [81] about the position of the car as I saw it.

Q. And which was the nose?

A. This was the front end of the car.

Q. Put an arrow down here, and I will close the back end of the car in. We will call that "H-1," if your Honor please. And that is the car that is seen here in Plaintiff's Exhibits 15 and 16, is that correct?

A. Yes, sir; as closely as I can put it on there; yes, sir.

Q. Now, did you find another car or truck there at the scene of the accident that had been involved in a collision with this car?

Mr. Wilmer: Just a moment. If it please the

(Testimony of Robert Russell Harris.)

Court, we object to counsel assuming something which is not in evidence.

The Court: The objection is sustained.

Q. (By Mr. Palmquist): All right. Did you find something, anything of any kind, a rock or meteor or anything?

A. There was a truck, I would say one hundred fifty feet in the direction of Flagstaff over on the north side of the highway.

Q. All right. A truck.

A. Yes, sir. It was off the highway down into sort of a field there.

Q. Did that truck remain in the position it was in when you first saw it—and you got there before the patrol officer, [82] you testified, you are sure of that? A. Yes, sir.

Q. Did it remain in that position until the next day without being moved?

A. Yes, sir; it did.

Q. I will show you a picture; I will have this picture marked in evidence.

(Plaintiff's Exhibit 17 marked for identification.)

Q. (By Mr. Palmquist): Can you identify this as the truck you saw there?

A. Yes, sir; that is the truck and in the same position.

Q. And in the same position?

A. No; this is not the truck. This is not the

(Testimony of Robert Russell Harris.)

truck. This is not the truck. Do you have some other pictures?

Q. Yes, I do.

A. This has a wrecker in the front of it, doesn't it, sir?

Q. Yes, I believe that is right. Here, I have a closer up view.

A. I can't see that truck from here. I think it is a wrecker.

Q. This is a closer deal.

(Plaintiff's Exhibit 18 marked for identification.)

Q. Now, I call your attention only to the rear end of the truck.

A. The rear end of the truck is the same, but I can't see [83] the front end of the truck for this other vehicle in front of it.

Q. Is that the same position it rested in that night when you came up there, as you did, before the Highway Patrol had gotten there?

A. Yes, sir.

Q. Which side of the highway is that?

A. This is the north side of the highway, sir.

Q. Do those truly and correctly represent, referring only to the left and left rear there—I mean it would be the right rear, pardon me, of that trailer?

A. Of the truck trailer?

Q. Yes. A. Yes, sir.

Mr. Palmquist: If Your Honor please, we offer these two pictures in evidence, 17 and 18.

(Testimony of Robert Russell Harris.)

Mr. Wilmer: These, I take it, are offered for the sole purpose of showing the position the witness says the truck and trailer were in on the evening he came by there, is that right?

Mr. Palmquist: Or what other things the witnesses may point out. Those were taken the next morning, I understand.

Mr. Wilmer: If the Court please, I am prepared to agree to a lot of things that haven't been discussed in it that are shown in it. [84]

Mr. Palmquist: I haven't asked counsel to, if Your Honor please. I have only asked this go into evidence at this time to show the position of the truck. And the Sergeant has testified it is a true and correct photographic representation as he saw it.

The Court: For that purpose it will be received.

Mr. Wilmer: I desired to clarify the record. I thought counsel misunderstood.

(Plaintiff's Exhibits 17 and 18 marked in evidence.)

Q. (By Mr. Palmquist): Sergeant Harris, would you step down here, and using Plaintiff's Exhibits 17 and 18 in evidence to refresh your memory, would you take this black crayon and on Plaintiff's Exhibit 3 in evidence draw in the position of that truck and trailer, if you can, the approximate distance. Did you approximate that distance?

A. I approximated between one hundred fifty and two hundred feet.

(Testimony of Robert Russell Harris.)

Q. Between one hundred fifty and two hundred feet? A. Yes.

Q. All right, will you take this and approximate it and draw in the right rear corner of the trailer so we will have some basis. And I imagine we can use the figure of eight feet in width for the trailer.

A. Now, the truck and trailer were slightly jackknifed, not too much, but slightly jackknifed. The trailer was something [85] like that (indicating).

Q. Mr. Harris, would you draw that about eight feet wide. You have drawn the car about six feet wide; that would be at least eight feet wide, just to keep it somewhat in proportion.

Mr. Scoville: One inch is three feet on that one inch marker on that scale.

Mr. Palmquist: Could I ask counsel through the Court what the length of his trailer was?

Mr. Wilmer: Trailer or equipment?

Mr. Palmquist: The trailer.

Mr. Wilmer: Just the trailer?

Mr. Palmquist: Yes.

Mr. Wilmer: Thirty-four feet.

Mr. Palmquist: Thirty-four feet. Could we measure on here thirty-four feet.

Q. (By Mr. Palmquist): The trailer would be headed in which direction?

A. Headed in a northerly direction.

Q. So off the map in this direction I will make an arrow like that, if Your Honor please; we will call this "H-2."

All right, you may be seated, if you will, Ser-

(Testimony of Robert Russell Harris.)

geant. Now, Sergeant, did you look at various marks on the highway out there the night of the accident?

A. Yes, sir.

Q. Did various people come along after you were there? [86]

A. Yes, sir, there was some people there the next morning—well, we went back when it was light.

Q. That was the next morning?

A. Yes, sir.

Q. That night could you mention some of the people that came along that night that were there at the scene of the accident?

A. Well, the undertaker came, the fireman came.

Q. What fireman?

A. The fireman from Flagstaff, Arizona.

Q. While he was there did you see him do some washing down? A. Yes, sir.

Q. Do you know why that was done?

A. It was to eliminate the hazard of that gas catching on fire that was running across the highway.

Q. What gas was that, gas from the trailer and that equipment or from the Hudson?

A. It was from the Hudson. It was running continuously for a short while there.

Q. Was there considerable gas?

A. Yes, sir.

Q. So that was washed down, is that correct?

A. Yes, sir.

Q. And you were there before that washing down

(Testimony of Robert Russell Harris.)

process took place? [87] A. Yes, sir.

Q. Did that washing down process change any of the skid marks that were left on the highway?

Mr. Wilmer: Just a moment, if it please the Court, we object to that. We have no objection to him testifying what he himself saw there before the washing down or after the washing down, but we object to his conclusion as to what was the effect of the washing down.

The Court: Yes, reframe the question.

Q. (By Mr. Palmquist): All right. Could you see any evidence in the gouge marks and skid marks you saw there before this washing process and the skid marks you saw after the washing process?

Mr. Wilmer: Same objection, if it please the Court. Until the marks that are shown are shown as related to the accident, until they are shown—

Mr. Palmquist: I will withdraw it and at this time put the marks in.

Q. (By Mr. Palmquist): I show you a picture—first, may I have this marked for identification? And I have an enlargement of that picture; and may I have that marked Plaintiff's Exhibit 19-A for identification?

(Plaintiff's Exhibits 19 and 19-A marked for identification.)

Q. (By Mr. Palmquist): Mr. Harris, I show you Plaintiff's [88] Exhibits 19 and 19-A for identification. Can you tell me which way that picture was taken, these pictures are taken?

(Testimony of Robert Russell Harris.)

A. This is taken northeast on the way toward Flagstaff.

Q. Looking toward Flagstaff. And can you see the rear of the trailer as you have drawn it in the position there?

A. Yes, sir.

Q. There happens to be a Highway Patrol car there too, of course.

A. Yes, sir.

Q. Do you also see some marks on the pavement?

A. Yes, sir, I do.

Q. Do you recognize those marks you see on the pavement?

A. They went directly from this——

Mr. Wilmer: Just a moment. If it please the Court, we object to the witness attempting to interpret the picture. We have no objection to him testifying what he himself observed there, but we object to him attempting to interpret the picture.

The Court: He is describing the marks, saying they went from one place to another. He hasn't attempted to say what they were.

The Witness: They went from this black mark to where the trailer came to rest.

Q. All right. In other words——

Mr. Wilmer: Just a moment. If it please the Court, [89] counsel again is asking the witness to testify to the contents before it has been offered in evidence and an opportunity given to object to it.

Mr. Palmquist: No, I am merely laying a foundation for the picture.

Mr. Wilmer: No, he is not, Your Honor.

Mr. Palmquist: I will withdraw the question. I

(Testimony of Robert Russell Harris.)

didn't get to ask the question before he objected that time.

Q. (By Mr. Palmquist): Will you say that these pictures, this one that is in glossy, and then the blowup of that picture, which is unglossy—

The Court: Refer to them by number, if you will.

Q. —which is Plaintiff's Exhibit 19 for identification and 19-A, 19-A being the blowup, a true photographic representation of the marks you saw there the night of this accident?

A. I didn't see those tracks that night. It was daylight the next morning when I saw them.

Q. Daylight the next morning? A. Yes.

Q. What time was that?

A. It was between 6 and 7 o'clock.

Q. Between 6 and 7?

A. On the 10th, 6 and 7 a.m., yes, sir.

Q. That was approximately three hours after the accident? A. Yes, sir. [90]

Q. At daylight at that time do you recognize these marks shown by these photographs, 19 and 19-A for identification, as being true and correctly represented in these photographs?

A. Yes, sir.

Mr. Palmquist: We will offer them in evidence.

Mr. Wilmer: We object, if it please the Court, on the ground there is no foundation laid. May I ask a couple of questions on voir dire?

Q. (By Mr. Wilmer): That night there was a very heavy amount of traffic along that highway?

(Testimony of Robert Russell Harris.)

A. There is between 6:30 and 8 o'clock, sir.

Q. That night the Patrol had trouble routing the cars past the accident, did they not?

A. There was quite a bit of traffic, yes, sir.

Mr. Palmquist: We will tie them in with numerous witnesses, if Your Honor please.

Mr. Wilmer: If it please the Court, until they are tied in we object on the ground——

Mr. Palmquist: They are tied in with this witness, if Your Honor please.

Mr. Wilmer: ——the picture taken at 6 o'clock, three hours or better after the accident, raises no presumption it correctly depicts the conditions that existed at the time of the accident.

Mr. Scoville: If Your Honor pleases, I would suggest [91] a picture taken three hours after the accident, it depends on what the picture shows. If I were stabbed at 3 o'clock in the morning and at 6 o'clock in the morning the knife was still in my back I submit the picture would be material.

The Court: I will let them in. It may go to the weight of it, the objection counsel has, but they will be admitted.

(Plaintiff's Exhibits 19 and 19-A marked in evidence.)

Q. (By Mr. Palmquist): Now, Mr. Harris, would you step down to Plaintiff's Exhibit 3 and take this red pencil, if you will, and by refreshing your memory by looking at Plaintiff's Exhibit num-

(Testimony of Robert Russell Harris.)

ber 19-A which is now in evidence, will you draw in the marks that you saw there?

A. You want me to draw both of these wheels?

Q. What you saw there that morning, say, and where they led up to.

(Witness indicates.)

The Witness: That is the way it went. Those are the duals of the trailer.

Mr. Wilmer: We object to that and ask it be stricken.

The Court: The answer may be stricken.

Mr. Wilmer: May I ask the Court, may the objection which we made to the materiality of the last two exhibits likewise go to further testimony or reference to them, or rather our objection to the fact there was not a proper foundation laid to their admission in evidence at this time, [92] and therefore further testimony to them would be inadmissible.

The Court: Very well, the record may show a continuing objection.

Mr. Palmquist: At this time we will mark these marks, if Your Honor please, as "H-3."

I would like to pass these pictures, if Your Honor please, to the jury in the order in which they have been gone over and the testimony, Plaintiff's Exhibit 13 as the black top; Plaintiff's Exhibit 15 as to the Hudson car, in relation to that black top; Plaintiff's Exhibit 16, another view of the Hudson in relation to that black top; Plaintiff's Exhibits

(Testimony of Robert Russell Harris.)

17 and 18, being the two different views of the trailer, and Plaintiff's Exhibit 19 and 19-A.

Would Your Honor care to see those?

The Court: No, I think I saw them as they were offered.

(Pictures passed to jury.)

Q. (By Mr. Palmquist): Did a wrecking car come to the scene of this accident before you left the scene of the accident?

A. You mean that night after the people were removed?

Q. Yes.

A. I don't remember whether one came before I left or not. As soon as the people, the lady which was the last one that was removed—no, the next to the last one that was removed from the car, when they took her away then we left shortly [93] after.

Q. When you came back the next morning, three hours later, did you find the Hudson car in the same position that it had been in or had it been moved?

A. I don't remember whether it was in the same position or not, but I know it was moved shortly after. Anyway, it was moved that morning sometime. I don't remember whether it was in the same position it was in after daylight as before, no, sir, I don't remember.

Mr. Palmquist: May I have this picture marked.

(Plaintiff's Exhibit 20 marked for identification.)

(Testimony of Robert Russell Harris.)

Q. I show you Plaintiff's Exhibit 20 for identification and ask you if you recognize that picture?

A. Yes, sir, that is the Hudson.

Q. And was that the position of the Hudson when it was in these other pictures that we have in evidence, Plaintiff's 16, or has it been moved?

A. It has been moved, sir.

Q. It has been moved? A. Yes, sir.

Q. Do you know how it was moved over there to that spot?

A. No, sir, I don't, because I didn't see it moved.

Q. You didn't see it moved?

A. No, sir, I didn't see it moved.

Q. But do you remember the next morning it was in this [94] position?

A. Yes, sir. Sometime the next morning I noticed it was in this position, yes, sir.

Q. Where is the Hudson in this position in relation to the black spot which was the patch over the culvert in the highway?

A. I would say it was about twenty or thirty feet, the position it rested in after the accident.

Q. Which way, going——

A. Toward the west.

Q. Pulled right off the road? A. Yes, sir.

Q. I noticed that you have the Hudson in these other pictures, and where you drew it on Plaintiff's Exhibit 3, as being in the black top.

A. Yes, sir, it is inside the black top, yes, sir.

Q. And you have the marks you saw there that started, starting in the black top about in front of

(Testimony of Robert Russell Harris.)

the Hudson, is that correct? A. Yes, sir.

Q. And I notice you have all those marks starting north of the center line of the highway.

A. Yes, sir.

Q. You did that intentionally, did you?

A. No, sir, that is what I could see.

Q. That is what you saw? [95]

A. The continuous marks right straight up to the truck where it was stopped, sir.

Q. And westbound traffic would be traffic which is north of this center line, is that right?

A. Westbound traffic——

Q. Yes.

A. Repeat that, please, sir.

Q. Westbound traffic would be in this lane right here, would it not? A. Yes, sir.

Q. And eastbound traffic in this lane right here, is that correct? A. Yes, sir.

Q. And this is the white center line?

A. Yes, sir.

Q. That same area is shown on this map—if Your Honor please, could I draw a red line through these X's, you can't see them back there.

Mr. Wilmer: We have no objection.

Mr. Palmquist: Thank you, counsel.

Q. (Continuing): Then we have the culvert which shows right there, do you see that?

A. Yes, sir.

Q. Right above that arrow?

A. Yes, sir. [96]

(Testimony of Robert Russell Harris.)

Q. Do you recognize the curve in the highway there to Flagstaff?

A. This is to Flagstaff, that way, right, sir?

Q. No, that is to Williams or on to California and this is to Flagstaff this way.

A. The automobile would have been on this side of the highway.

Q. Or north of the center line.

A. North of the center line, yes, sir.

Q. And this would be the west bound lane and this would be the east bound lane?

A. Yes, sir.

Q. And that black asphalt was down here, the line on either side of that culvert, is that correct?

A. Yes, sir.

Q. Right in there (indicating).

A. Yes, sir.

Q. Now, Sergeant, you drive this many times, do you not?

A. Yes, sir. Not from Williams—I have driven it. But from the Navajo Ordnance Depot to Flagstaff I drive it quite often.

Q. The Navajo what?

A. Ordnance Depot.

Q. Where is that?

A. That is about three miles west, approximately three [97] miles west of this place right here.

Q. So you were going back and forth between the Navajo Ordnance Depot and Flagstaff many times, is that correct?

A. Yes, sir.

(Testimony of Robert Russell Harris.)

Q. Now, as a result of what you have seen, you had seen there that night and the next day, as you have shown us in these photographs, did you make some special observations concerning the place where this accident happened as to the curve?

A. Yes, sir, I have come in that curve quite a few times. And without turning the steering wheel I almost—well, there is a way you could pick up those tracks and go right straight where the truck landed up, sir.

Q. You mean if you were east bound in the proper lane of traffic down here, coming along, and as you come into this curve you mean if you don't turn your steering wheel—

A. Yes, sir, I could end up—

Q. What would happen?

A. —the same place where the truck does.

Q. We have a picture which was just identified, I believe, which is looking back—this had been admitted for identification, Plaintiff's Exhibit 4 for identification. Mr. Fronske from Flagstaff has identified this as being a picture taken looking westerly now.

A. Yes, sir. [98]

Q. And you see this coming from the black top, that would be the fourth pole, the fourth guidepost?

A. I didn't count those posts, sir.

Q. No, but on this picture? A. Yes, sir.

Q. If you counted that, one, two, three, four—well, three or four. A. Yes, sir.

Q. Was this post knocked down in this accident?

(Testimony of Robert Russell Harris.)

A. Yes.

Mr. Wilmer: Just a moment. If it please the Court——

The Court: The objection is sustained. The jury will disregard the last answer.

Q. (By Mr. Palmquist): But anyway, do you recognize this as being a position in relation to where the trailer ended? A. Yes, sir.

Q. And that is looking westerly, is it not?

A. Looking from this direction, yes, sir, westerly.

Q. Of course the trailer has been moved?

A. Yes, sir.

Q. Is that a true photographic representation of that place where this accident happened, as it existed at the time of the accident?

A. Yes, sir.

Mr. Palmquist: We will offer Plaintiff's Exhibit 4 [99] in evidence at this time.

Mr. Wilmer: Would you read back that last question and answer?

(The last question and answer were read.)

Q. (By Mr. Wilmer): You are testifying of your own knowledge this is how that place looked when the accident happened and you weren't even there?

A. This is after the truck had been removed, sir.

Q. The question was whether or not this is a true representation of the appearance at the time of the accident; you said yes.

(Testimony of Robert Russell Harris.)

A. He said after the truck had been removed.

(The previous question was read as follows:
“Is that a true photographic representation of that place where this accident happened as it existed at the time of the accident?”)

A. Well, I understood the counsel to say after the truck had been removed.

Mr. Palmquist: I had said something about the truck having been removed.

Mr. Wilmer: I don't have any objections. It doesn't make any difference.

The Court: It may be received.

(Plaintiff's Exhibit 4 marked in evidence.)

Q. (By Mr. Palmquist): Plaintiff's Exhibit 4 now in evidence is a picture, is it not, taken after the trailer had [100] been removed back there and looking right down the highway, isn't it?

A. Yes, sir.

Q. Past the curve, right?

A. Yes, sir. After the truck has been removed, sir.

Q. Yes, after the truck has been removed. I show you Plaintiff's Exhibit 12, which is the same place only looking in the opposite direction.

A. Northern direction, yes, sir.

Q. Yes. Now, I would like to call your attention to this curve to the right that is going toward Flagstaff.

A. Yes, sir.

Q. Just the opposite to the one the jury is now looking at. Is that the way that curve goes, uphill?

A. Yes, sir.

(Testimony of Robert Russell Harris.)

Q. If you are coming from Flagstaff you would come around an S turn in there before you would hit this turn, would you not? A. Yes, sir.

Q. And assuming a driver asleep, can you believe that he would ever reach this point in the highway?

Mr. Wilmer: Just a moment. If it please the Court, we object to the question as having no proper foundation, calling for a conclusion of the witness.

The Court: The objection is sustained. [101]

Q. (By Mr. Palmquist): Is this a correct representation under those circumstances?

A. Well, you can't see the S curve on the other end of this one.

Q. No. A. Yes, sir.

Q. As far as it shows?

A. Yes, as far as it shows.

Q. This is after the truck is removed?

A. Yes, sir.

Mr. Palmquist: All right, we will offer this, if your Honor please.

Q. (By Mr. Wilmer): This is looking on toward Flagstaff, is it?

A. Which one is this now?

Q. This one that has just been identified, Plaintiff's Exhibit 12, this is looking toward Flagstaff?

A. Could I see it again?

Q. Surely.

A. Yes, sir, that is looking toward Flagstaff.

Q. As you say, at the point where the truck was standing as you saw it and looking toward the east?

A. The truck has been removed.

(Testimony of Robert Russell Harris.)

Q. I saw where the truck was standing and looking toward the east toward Flagstaff. [102]

A. Yes, sir.

Mr. Wilmer: We have no objection.

The Court: It may be received.

(Plaintiff's Exhibit 12 marked in evidence.)

The Court: Let's proceed, counsel.

Mr. Palmquist: I have no further questions of this witness.

Cross-Examination

By Mr. Wilmer:

Q. Mr. Harris, if I may, briefly, see if I understand your testimony. When you first arrived you were signaled by some unknown person by flashlight and drove up and made a U turn?

A. Yes, sir.

Q. And stopped? A. Yes, sir?

Q. With your lights shining on the side of the vehicle where the physical damage was or on the opposite side?

A. On the opposite side at that time, yes, sir.

Q. You were the first person there, were you?

A. No, sir. The person that waved us down with a flashlight, I don't know who it was or what it was, but there were lights at the scene of the accident when we got there.

Q. There was a car there?

A. There were lights of some kind. I don't know whether it was a car or truck. [103]

(Testimony of Robert Russell Harris.)

Q. You don't know whether there was a car there or not?

A. I don't know whether it was a car or truck, but there was some vehicle there.

Q. How many people were there, do you recall?

A. At the time in the immediate——

Q. When you first got there, when you drove up and stopped your vehicle how many people were there?

A. In the vicinity of that vehicle, that Hudson?

Q. Yes.

A. There was no one there at that Hudson at that time except the girl that was standing on the outside.

Q. Except the people that were in the car or had been in the car?

A. Yes, sir.

Q. How soon did anyone arrive?

A. Sir, I don't know. After I observed this I asked my wife if she wanted me to go get the ambulance. I took off to get the ambulance and when I got back there were some people there.

Q. Between the time you got there and the time you left for the ambulance what did you do?

A. The only thing I could do. I asked her how bad they were and should I go get an ambulance; she said yes. I got back in my car, I turned it around and left for the Ordnance Depot. [104]

Q. You left immediately?

A. Yes, sir.

Q. When you came back you had driven approximately what, five or six miles round trip?

(Testimony of Robert Russell Harris.)

A. I would say close to eight miles round trip, sir.

Q. Did you spend any time at the Ordnance Depot or did you turn immediately around and come back?

A. I got the driver to get out of bed and get the ambulance. I told him what had happened, that we had an accident, and I woke him up and he dressed—he was dressed when I got out there, but I left immediately to go back to the scene of the accident. I told him it was on the way to Flagstaff.

Q. How many people were there when you got back there?

A. I don't know how many people were there when I got back there.

Q. Quite a few?

A. I couldn't say, sir, because I was involved then in helping my wife straighten up one of the people that was in the car.

Q. Had the ambulance arrived yet or the coroner?

A. No, sir, they had not.

Q. Had the Patrol arrived?

A. Not when I first got back the second time.

Q. How quickly did the Patrol arrive?

A. I don't remember, it must have been, judging, maybe five [105] or ten minutes.

Q. How quickly did the ambulance arrive?

A. Well, the government ambulance arrived before the civilian ambulance did.

Q. Well now, in relationship to the time you got

(Testimony of Robert Russell Harris.)

back there how quickly did the government ambulance arrive?

A. I would say between five and eight minutes.

Q. How quickly did the civilian ambulance arrive?
A. I couldn't say, sir.

Q. During this time you were helping your wife attempting to take care of the injured and dead people, is that right?

A. Yes, sir; before our ambulance got back?

Q. Yes.
A. Yes, sir.

Q. Then when your ambulance arrived had the Patrol arrived at that time?

A. I don't think it had, sir.

Q. Are you sure of that?

A. No, sir; I am not sure, but I don't think it had.

Q. How quickly did traffic start backing up along the highway?

A. There was traffic already backed up, not too many.

Q. Quite a number of people around?

A. No, sir; I don't think there were so many people around at that time. [106]

Q. How many cars would you say were backed up there when the Patrol arrived?

A. I couldn't say.

Q. Were there as many as twenty?

A. I still couldn't say.

Q. You don't know?

A. No, sir: I don't know.

(Testimony of Robert Russell Harris.)

Q. After the Patrol arrived the fire truck from the city of Flagstaff arrived, did it not?

A. I believe the fire department arrived first.

Q. That is your recollection, is it?

A. Yes, sir.

Q. After the fire department arrived what did it do?

A. It started spraying some kind of liquid on the place where the gasoline was running out of the Hudson.

Q. How large an area of the highway did it cover with this liquid?

A. You mean the fire department?

Q. Yes.

A. Well, I would say from twelve to twenty feet, sir.

Q. Did it cover the pavement from north to south also?

A. He sprayed it under the Hudson and then right straight on across the highway.

Q. Taking east and west, arbitrarily, since they are not true east and west, how much of the pavement east and west [107] would you say he sprayed with that material?

A. I would say between twelve and twenty feet.

Q. As much as thirty feet?

A. I don't know, sir. I don't believe it would have gone thirty feet.

Q. That covered substantially the entire black top area, did it not?

A. I think it covered some to the east, that is

(Testimony of Robert Russell Harris.)

going toward Flagstaff, some of the concrete itself, sir.

Q. From the car, where the Hudson car was stopped eastward, how far, to your best recollection, did the fire department spray this material?

A. Well, sir, it sprayed it—I don't know whether it was coming from the gas tank or gas line——

Q. I am asking you how far from the car, taking the car as the westerly beginning point.

A. Yes, sir.

Q. How far easterly along the highway did they cover the highway with this material, this solution?

A. I don't know, sir, between twelve and twenty feet.

Q. In other words, I take it, the Hudson car was the westerly starting point for the spraying of the pavement?

A. Not exactly. They went beyond the stopping point of the front of the Hudson.

Q. How far did they go? [108]

A. I would say between four and five feet.

Q. Starting four or five feet west of the westerly part of the Hudson and to the east they covered the entire highway with this solution, did they not?

A. I would say yes, sir.

Q. It was under pressure, was it not?

A. I think so, yes, sir.

Q. It was a forced solution that was sprayed on the pavement with considerable force?

A. As near as I could tell from the man that was doing it it was sprayed with some force.

Mr. Palmquist: I would like to advise counsel

(Testimony of Robert Russell Harris.)

through the Court that we have the man here that did that work under subpoena.

Mr. Wilmer: I am very well aware of that, your Honor.

The Court: Proceed with your cross-examination.

Q. (By Mr. Wilmer): Then the broom was used, was it not, to scrub the surface of the highway? A. Sir, if it was I didn't see it.

Q. You didn't observe that? A. No, sir.

Q. There was a considerable amount of confusion around there at the time, was there not, a lot of traffic and a lot of people getting around smoking and causing considerable concern as to the possible effects of a fire? [109]

A. There were some people that were smoking and it was causing concern of myself and my wife too they did not catch that on fire before the fire department got there.

Q. I am speaking of after you returned, Mr. Harris; for that hour of the morning there was a very large amount of traffic and considerable amount of people around the scene as curious onlookers always gather? A. There were some, yes, sir.

Q. It was not until the next morning, Mr. Harris, that you went out there to make a careful examination of the scene of the accident?

A. That is true, sir.

Q. You did not make a sufficient examination the evening you were there you were satisfied with?

A. No, sir.

(Testimony of Robert Russell Harris.)

Q. Did you have any official connection with the making of this investigation? A. No, sir.

Q. Now, do I understand from your testimony, Mr. Harris, that you have from the things you have observed in Plaintiff's Exhibits 19 and 19-A——

A. All this observing was the next morning at daylight.

Q. Yes. A. Yes, sir.

Q. Based upon the things you saw there as reflected in [110] 19 and 19-A, you have put upon the board, whatever that exhibit is, the big one back there.

Mr. Scoville: Three.

Q. (Continuing): Plaintiff's Exhibit 3, red lines which you say indicate tire marks which you saw? A. Yes, sir; as close as I could draw it.

Q. Your clear recollection is those tire marks extended from westerly of the nose of the Hudson, beginning westerly from the nose of the Hudson you could trace them across the pavement to where the trailer had stopped? A. Yes, sir.

Q. How far west of the nose of the Hudson would you say they began?

A. I don't remember, sir.

Q. Would it be as much as you have indicated here of four feet?

A. It could be more than four. It could be I think more than four, maybe less than four.

Q. Is it your testimony those marks were very clearly discernible from the point west of the place the Hudson was resting that evening on the pavement to where the trailer was standing?

(Testimony of Robert Russell Harris.)

A. Not in the evening, sir, I couldn't see it.

Q. Pardon? I say the following morning. Is it your testimony these marks were clearly [111] discernible?

A. Yes, sir, the next morning they were.

Q. From where the Hudson had been that morning at 3 o'clock you saw it? A. Yes, sir.

Q. On to where the trailer stood?

A. Yes, sir.

Q. And that is reflected in these pictures here?

A. Yes, sir.

Q. Had you made any examination, Mr. Harris, of the pavement any time prior to the 10th of July, 1955, in that area, I mean a careful examination?

A. No, sir, but I have gone over that area frequently.

Q. No, the question I asked you, Mr. Harris, if you had made a careful examination such as stopping your car, getting out and examining the pavement? A. No, sir.

Q. You have no knowledge then as to the marks or gouge marks that may or may not have been in the pavement prior to the accident?

A. The gouge marks I know nothing about.

Q. You saw no gouge marks?

A. The only thing I saw was the continuous tire tracks from the point I indicate, four to eight feet or less, to where the truck stopped to rest. The gouge marks I didn't notice.

Q. This personal property, things of that character you [112] testified you saw——

(Testimony of Robert Russell Harris.)

A. The personal property?

Q. Yes. A. Or contents of the car?

Q. Yes, contents of the car or trailer?

A. Yes, sir.

Q. They were from that point where the Hudson was at rest easterly toward Flagstaff?

A. There was some, the glass, and there was some contents down to the left of the car there.

Q. Down to the left of the Hudson car?

A. Yes, sir. Right in there.

Q. Right in this area, which is easterly——

A. To the easterly, right, sir.

Mr. Palmquist: Could we have that marked?

Q. (By Mr. Wilmer): Was it close to the car?

A. Yes, sir, there was some close to the car. In fact, I could get to this side of the car and I did look at the occupant under the steering wheel there; and I had no trouble getting up to it.

Q. You had no trouble because of the debris on the pavement? A. That is right, sir.

Q. Am I to understand from that there was a substantial amount of debris here and not much back toward the east?

A. That is right. I don't remember seeing very much over [113] ten feet behind the car.

Q. Ten feet to the east?

A. Yes, sir. That is on the highway, but there was some off on the shoulder.

Mr. Palmquist: Could we have the witness mark it, your Honor?

(Testimony of Robert Russell Harris.)

Mr. Wilmer: We will put a circle here.

Mr. Palmquist: I would rather the witness make the circle rather than counsel.

Mr. Wilmer: On redirect examination you can do it.

Q. (By Mr. Wilmer): I have placed an orange circle. A. Yes, sir.

Q. Does that look about right?

A. If the occupant which is driving the automobile——

Q. If you would care to step down.

A. This is going to be the front of the automobile?

Q. You drew it; I am assuming you knew it.

A. I can step right in here without any trouble at all, but there was debris back over here, not to excess.

Q. When you say "Over in this area" you have drawn a straight line from the circle in a **north-easterly** direction? A. Yes, sir.

Q. Now, in relationship, Mr. Witness, to the black top are you conversant with the fact these two lines have been drawn here as indicating the general black top area? [114] A. Yes, sir.

Q. Is it your statement the Hudson when you saw it that evening was at the extreme easterly edge of that black top area? A. The easterly?

Q. Yes.

A. Yes, sir, it was on the edge of that black top and it was there——

Q. Was it on the easterly edge or westerly edge?

(Testimony of Robert Russell Harris.)

A. On the easterly edge.

Q. In fact, just the front end was on the easterly edge? A. Well, I would say yes, sir.

Q. Where with respect to the Hudson, if you remember, that evening was the two-wheel trailer?

A. I didn't see that until the next morning, sir.

Q. You don't know where it was that night?

A. No, sir, I don't.

Q. Where did you see it the next morning?

A. It was over in the field beyond the rear end of the Hudson.

Q. In relationship to the culvert and that area where was it?

A. I couldn't say exactly because I don't remember where it was, sir.

Q. With respect to a point directly north, rather directly [115] northeasterly——

Mr. Palmquist: I have a picture of it here, counsel.

Mr. Wilmer: I would appreciate it if I can go ahead with my cross-examination.

The Court: Don't interrupt counsel.

Mr. Palmquist: All right.

Q. (By Mr. Wilmer): Referring to a point directly northeast of the northeasterly edge of the Hudson, now from that point how far would you say the two-wheel trailer was that next morning when you saw it, either to the east or to the west?

A. I would say it was to the west of that.

Q. And how far? A. I don't remember, sir.

(Testimony of Robert Russell Harris.)

Q. You went out to investigate the matter and make some investigation?

A. At the same time I was helping pick up the personal effects.

Q. I am speaking of the next morning.

A. That is what I am talking about.

Q. What is your best recollection then, Mr. Witness, as to where the two-wheel trailer was the next morning?

A. I would say five, maybe eight feet to the left of that line.

Q. Five to eight feet further westerly? [116]

A. Yes, sir.

Q. That is your recollection?

A. That is approximately, yes, sir, my recollection.

Q. The evening when you were there and made certain casual, I believe, observations——

A. The evening?

Q. The morning after, I am sorry.

A. Yes, sir.

Q. Is it your statement now you clearly recall there was not any substantial amount of debris more than ten feet east of where the Hudson was?

A. It is my recollection, yes, sir.

Q. To your recollection? A. Yes, sir.

Mr. Wilmer: We have no further questions.

(Testimony of Robert Russell Harris.)

Redirect Examination

By Mr. Palmquist:

Q. Counsel has said when you went out there to investigate the accident. Did you go out there to investigate the accident at 6 o'clock that morning, three hours after this happened?

A. We didn't go to investigate, we went to satisfy ourselves about some things we had talked about and thought about from the time we left the hospital where the patient was left until that morning. [117]

Q. You said you were going out to pick up some personal effects?

A. No, sir. We arrived there, see. They hadn't cleared the personal effects; my wife and myself both helped load them on a vehicle that was furnished by the city of Flagstaff or court of Flagstaff to do things like that.

Q. You were picking up the personal effects?

A. Yes, sir.

Q. Now, was there some difficulty in getting some of the injured people out of the car?

Mr. Wilmer: Objected to as being immaterial, if the Court please.

Mr. Palmquist: Well, this may become significant.

Mr. Wilmer: Until it becomes significant.

Mr. Palmquist: Well, we won't have this witness here, if Your Honor please.

(Testimony of Robert Russell Harris.)

Mr. Wilmer: I am sorry, but there has been no foundation.

Mr. Palmquist: I withdraw the question and will get at it this way.

Q. (By Mr. Palmquist): Mr. Harris, when you arrived there you found one girl out of the car?

A. Yes, sir.

Q. Do you know which one of the girls that was?

A. It was the oldest of the three that occupied the car, [118] oldest of the three children.

Q. Oldest of the three that occupied the car, Norma? A. Yes, sir.

Q. Do you know who was driving the car, who had been driving the car?

A. Mr. Sanders was driving the car.

Q. Do you know where Mrs. Sanders had been seated?

A. No, sir, I don't know where she was seated but I know what position she was in after I came back.

Q. Yes. What was her position?

A. Her feet was toward the south side of the highway and her head was over on the north side of the car.

Q. In which seat, front seat?

A. She was in the rear, yes, sir, rear seat.

Q. Was she on the right side or left side of the car?

A. Well, she was laying across the whole works of the car there.

Q. In the back?

(Testimony of Robert Russell Harris.)

A. Yes, sir, as near as I could tell.

Q. I see what you mean. Then were there some other girls in the car?

A. Well, at the time, at this time I went on to the Depot; when I got back the two girls, the one that was outside the car and the other girl that was in the front seat had departed for the hospital. But the one we took back to the Ordnance [119] Depot was laying in the back seat. And some of the personnel there had got it rested and on its back, the one we admitted to our hospital at the Depot.

Q. Which one was that of the girls?

A. That was the middle, the one that was thirteen.

Q. Wanda?

A. Yes, sir, Wanda was the name.

Q. Was she still in the car when you came back?

A. Yes, sir.

Q. Was there some difficulty in removing her from the car?

A. Well, the only difficulty was it was kind of dead weight and unhandy to get to her to get her on the stretcher to put her in the ambulance.

Q. Was there a tow truck using a cable to pull doors open on that car?

A. Sir, not while I was there. If it was I didn't see it.

Q. Do you know whether or not anyone had used boards to try to pry doors open?

A. If they did I didn't see them while I was there, no, sir.

Mr. Palmquist: I have no further questions.

Mr. Wilmer: That is all.

(Witness excused.)

The Court: At this time, gentlemen, we will take a recess until 10 o'clock tomorrow morning. Please be here promptly at that time and please bear in mind the admonition [120] heretofore given you.

(Whereupon, a recess was taken at 4:30 o'clock p.m. until 10 o'clock a.m. Friday, August 5th.)

The Court: You may proceed.

Mr. Scoville: Your Honor, at this time I would like to offer a certified copy of the letters of administration of Ralph Wanek, of the estates of Herbert N. Sanders and Delphia F. Sanders, out of the Superior Court of the State of Arizona in and for the County of Coconino, certified as having been issued to Mr. Wanek on July 12, 1954; and letters of special administration in cause 2408 of that Court and attested to by the clerk of that Court on August 3, 1955, as having been and still being in full force and effect.

Mr. Wilmer: It was not my recollection that the suit was as special administrator, Your Honor.

Mr. Scoville: The suit simply states, I believe, he is the administrator. It doesn't designate him as being general or special. Under the laws of the State of Arizona the special has all the powers of a general.

Mr. Wilmer: If it please the Court, we object

on the ground the action is not brought by a special administrator and hence the letters or purported letters of special administration would be immaterial; secondly, on the ground the special administrator would have no jurisdiction in prosecuting this action. [121]

Mr. Scoville: Under the laws of Arizona a special administrator may prosecute claims and/or sue or be sued.

Mr. Wilmer: There is a specific statute on wrongful deaths, Your Honor, that does not apply to a special administrator.

The Court: It will be received. I will hear you on your other points in regard to it at another time.

Mr. Wilmer: Very well.

(Plaintiff's Exhibit 21 marked in evidence.)

GLENN FLAKE

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Scoville:

Q. Will you state your name to the Court and jury? A. Glenn Flake.

Q. Mr. Flake, where do you presently reside?

A. Snowflake, Arizona.

Q. Have you heretofore held a position with the Highway Patrol of the State of Arizona?

A. Yes, sir.

Q. And in what capacity? A. Patrolman.

(Testimony of Glenn Flake.)

Q. And were you such patrolman on July 10, 1954? [122] A. Yes.

Q. Mr. Flake, where were you stationed?

A. Flagstaff.

Q. And how long have you been stationed at Flagstaff or how long were you stationed at Flagstaff, approximately?

A. Just about a year.

Q. Now, what area were you assigned to and in which you performed your duties?

A. All directions out of Flagstaff, all four highways leading out.

Q. Are you presently working as a patrolman?

A. I am on inactive duty now recuperating from an accident.

Q. I believe you were involved in an accident, the result of which you have been off of active duty for a considerable length of time, is that right?

A. Yes, sir.

Q. Now, Mr. Flake, directing your attention to the date I mentioned, July 10, 1954, did you have occasion to go to the scene of an accident approximately seven and one-half miles west of Flagstaff, an accident in which one Herbert Sanders and his wife Delphia Sanders had been killed?

A. Yes, sir.

Q. Do you recall the occasion?

A. Yes, I do.

Q. Now, what were the circumstances, did you go to the [123] scene of that accident?

A. Yes, I did.

(Testimony of Glenn Flake.)

Q. And was yours the initial call as patrolman?

A. No.

Q. What sort of call did you get?

A. A follow up.

Q. And by "follow up" I take it you were following up the first officer dispatched?

A. Yes, investigating officer.

Q. To investigate the accident. Do you recall where you were, were you in Flagstaff or were you east or west of the scene?

A. No, I was home in bed at the time.

Q. You were home in bed at the time?

A. Yes, sir.

Q. Now, you stated you went to the scene of the accident? A. Yes, sir.

Q. Do you have any recollection as to the approximate time that you departed from your home to go to the scene? Do you know approximately what hour it was?

A. Well, I don't know that I would be able to pin it down too close. I would say somewhere around 5 o'clock, between 4 and 5 o'clock, as I recall it from here. I didn't make any note of the time or anything.

Q. You had no reason—at least it was in the early [124] morning hours?

A. Yes, that is true.

Q. On the way out did you have occasion to pass or to see fire equipment of the city of Flagstaff?

A. Yes, sir.

Q. What kind of vehicle was that?

(Testimony of Glenn Flake.)

A. It was a pickup.

Q. And was it equipped with any special equipment?

A. Yes, it had hoses with water tank. I suppose that was the water they were carrying. It was a built-in job.

Q. Carrying a red light, too?

A. Yes, sir, it had a red light.

Q. Where did you first see the fire truck, approximately?

A. Soon after I left Flagstaff. It was ahead of me on the road.

Q. Did you pass the fire truck? A. I did.

Q. Did you arrive at the scene of this accident before the fire truck arrived? A. Yes, I did.

Q. Now, tell us upon arrival at the scene what vehicles you found there had been incapacitated in some fashion.

A. There was a touring car that had been pulling a luggage trailer. I believe it was a Hudson, from my recollection, heading, had been heading in a westerly direction. [125]

Q. That is the passenger car was going away from Flagstaff? A. Away from Flagstaff.

Q. Going west? A. Going west.

Q. And what other vehicle did you find there?

A. Found a large truck, I believe it was a Mack tractor and trailer.

Q. It was headed and had been headed in what direction?

A. Had been headed in an easterly direction.

(Testimony of Glenn Flake.)

Q. Can you, without getting down from the witness chair, can you see this plat which is Plaintiff's Exhibit 3? A. Yes, I can see it.

Q. Now, you have said that the passenger car was headed in a westerly direction, which on this plat would be to my left, is that correct?

A. That is correct.

Q. Where my left hand is pointed. And going away from Flagstaff? A. Yes, sir.

Q. And the truck is an easterly direction towards Flagstaff? A. Yes, sir.

Q. The pavement at that portion of the highway and at that time was of what type?

A. Well, there is two types of construction. The center part is concrete and the outside is oil type construction. [126] There is a shoulder built on each side of the old pavement.

Q. The old Portland cement pavement?

A. Yes.

Q. In order to fix this in our minds, the north one-half of that pavement would be for vehicles traveling in what direction?

A. In a westerly direction.

Q. For vehicles going west it would be the proper lane? A. Yes.

Q. And the south one-half of the pavement for vehicles traveling what direction? A. East.

Q. That would be toward Flagstaff?

A. Toward Flagstaff.

Q. You have told us there was a passenger car

(Testimony of Glenn Flake.)

there at that time and place. You recall there is a culvert at that point, approximately?

A. Just from my own recollection I didn't recall particularly a culvert there. However, after seeing evidences from the scene it has recalled it to my memory.

Q. I showed you the pictures this morning?

A. Yes.

Q. You do now recall there was a culvert there?

A. Yes.

Q. Incidentally, you were not the officer who wrote the [127] investigation in this matter?

A. No, I was not.

Q. Can you tell us from your best recollection approximately where the Hudson automobile was resting when you arrived?

A. I would say it was about half on the oil construction and half on the cement construction of the highway on the north side of the center line.

Q. If it were north of the center line it was at that time in the proper lane for vehicles traveling in that direction, is that right?

A. That is correct.

Q. Can you tell us—you have said it was approximately half on the cement and half on the shoulder, would that be the north shoulder?

A. On the north shoulder, yes.

Q. At that time was the vehicle occupied?

A. Yes, it was.

Q. Will you tell us just briefly what the occupancy of that vehicle was, as you remember it?

(Testimony of Glenn Flake.)

A. There was a man in the driver's seat that was dead at the time. He was pinned in his seat. And there was a woman in the rear seat of the vehicle.

Q. Did you also see some other persons who had been in the vehicle or were still in the vehicle? [128]

A. I did not see them at the time.

Q. At that time you did not?

A. No, I didn't.

Q. What duties did you perform?

A. Well, I helped direct traffic when I first got there and as we removed the woman from the vehicle I assisted in taking her from the rear seat of the vehicle, putting her in the ambulance; and later helped remove the gentleman from the front seat.

Q. On your arrival at this scene and observing the Hudson automobile, as you told us you saw it, did you observe in and about that location at any place any debris such as dropped dirt, broken glass, things of that sort?

A. Yes, sir.

Q. Where was that debris located with reference to the center line of the highway, was it to the south for vehicles traveling to Flagstaff or was it in the north lane for vehicles traveling away from Flagstaff?

A. It was in the north lane.

Q. It was in the north lane?

A. It was in the north lane, yes.

Q. Was that before the fireman washed it away?

A. Yes, sir.

Q. Now, I have not asked you about the Mack

(Testimony of Glenn Flake.)

truck. Can you tell us approximately, from your own recollection [129] approximately where the Mack truck was standing at the time of your arrival?

A. It was off on the north side of the road completely off the highway, off, I would say, just estimating it, at one hundred yards to the east of the accident scene.

Q. Now, did you remain at the scene for some length of time, Mr. Flake? A. Yes, sir.

Q. How long did you stay, with reference to darkness and daylight?

A. I was still there after it come daylight.

Q. What was your purpose in remaining at the scene from that time until daylight, or what were your several purposes?

A. The investigating officer had left the scene to go into town to attend to further investigation of the accident and I stayed to guard the scene to see that nothing was molested in the trailer or truck or see nothing was removed from the highway that would be of——

Q. Then you were there continually from the time you arrived until the daylight hours, is that correct? A. Yes, I was.

Q. Did you during that time protect the scene that you have described? A. Yes, I was.

Q. Were photographs taken then after daylight? [130] A. Yes, they were.

Q. By whom?

A. Roy Bryfogle, the other investigating officer.

(Testimony of Glenn Flake.)

Q. The other Highway Patrol?

A. Yes, sir.

Q. Did the scene remain the same from the time you arrived, except for the washing of the debris away by the fireman, until the pictures were taken? How did you route your traffic?

A. I routed the traffic on the south side of the road. However, there were pictures taken before the vehicle was moved and after the vehicle was moved both.

Q. During the nighttime I believe there were some pictures taken?

A. There were some pictures taken during nighttime. And after it became daylight there were additional pictures taken.

Q. I will show you what has been marked Plaintiff's Exhibit 16 in evidence, I believe. Do you recognize that picture? A. Yes, sir.

Q. And of what is it a picture?

A. The Hudson car we had reference to earlier.

Q. Is that the way it appeared in the nighttime when you arrived, substantially at least, to the best of your recollection?

A. Yes, to the best of my recollection that is the way it [131] appeared.

Mr. Palmquist: What was that exhibit, counsel?

Mr. Scoville: 16.

Q. (By Mr. Scoville): I will show you also what is Plaintiff's 15. You recognize that picture?

A. Yes, sir.

Q. And is it a picture of the Hudson?

(Testimony of Glenn Flake.)

A. Yes, it is.

Q. Taken at the same time? A. Yes, sir.

Q. Now, directing your attention to some of the pictures taken after daylight hours. I will show you Plaintiff's 19 and ask you to examine that picture. That is in evidence at the present time. Do you recognize the objects in that picture?

A. Yes, sir.

Q. Is that at the scene? A. That is.

Q. Is that the scene as it appeared that morning? A. Yes, it is.

Q. I will direct your attention to a patrol car in the foreground between the point where the picture was taken and the truck. Was that your patrol car, do you recall?

A. The vehicle assigned to me, yes.

Q. That was the vehicle assigned to you. Now, I direct your attention to various tracks appearing in that picture on [132] the north side of the highway, marked, and in Plaintiff's 19-A in evidence, an enlargement of the same scene. Now, will you tell us if those marks as shown in that picture on that pavement were present at the time you were there?

A. Yes, sir.

Q. Now, at the time the firemen arrived what did they do?

A. In the accident there was quite a large quantity of gas spilled on the highway and they were washing the gas from the highway keeping it from igniting from any spark or something that might be left from the scene.

(Testimony of Glenn Flake.)

Q. Did you observe where the gas came from?

A. I would say from the Hudson car. It was mostly in and around the Hudson vehicle.

Q. Where they washed was that mostly around and under the Hudson? A. Yes, sir.

Q. Now, I am not sure whether I asked you, was there a luggage trailer that had been attached to the Hudson? A. Yes, sir.

Q. Did you observe anything in the way and about in the way of personal property, personal effects that had come from the luggage trailer?

A. Yes. As we went to clean it up I noticed some of the things that were there, as we were gathering some of the things back together. [133]

Q. What were they, did you notice?

A. I noticed particularly there were some children's toys, little doll buggies, things like that. We commented on that at the time.

Mr. Scoville: You may cross-examine.

Mr. Wilmer: Mr. Scoville, was there a picture identified and not put in?

Mr. Scoville: I didn't identify any pictures.

Mr. Wilmer: Didn't you show him one taken in the morning?

Mr. Scoville: I have shown him these I have laid down.

The Court: All those counsel examined about are in evidence.

Mr. Scoville: These are the only ones I examined him about, Mr. Wilmer. Would you pardon

(Testimony of Glenn Flake.)

me, Mr. Wilmer. Counsel has pointed out to me one thing I overlooked that perhaps I should ask on direct examination. May I proceed?

Mr. Wilmer: Surely.

Q. (By Mr. Scoville): There are a few pictures perhaps we haven't identified. I would like to with this witness, if the Court would bear with me just a moment.

Mr. Palmquist: Counsel, why not offer all the Highway Patrol pictures?

Mr. Scoville: Yes. I am sorting those, Mr. Palmquist, that were not taken by the Highway Patrolman.

Q. (By Mr. Scoville): Mr. Flake, let me show you what is Plaintiff's Exhibit 20. I will ask you to look at that [134] picture. Do you recognize the scene displayed in that photograph?

A. Yes, sir.

Q. And of what is that a picture?

A. That is a picture of the same Hudson that was in the accident earlier that morning.

Q. That is another picture of the scene you have described with reference to the other photographs as it existed on the early daylight hours of July 10, 1954?

A. The vehicle had been moved from the original——

Q. Which vehicle had been moved?

A. The Hudson vehicle had been moved.

Q. Moved from the highway?

A. Moved from the highway where it came to rest.

(Testimony of Glenn Flake.)

Q. That had been moved by whom, do you recall?

A. I think it was Caffey's Auto Salvage, a fellow by the name of Veazey was the driver of that.

Q. Other than the removal of the Hudson from the highway by the garage man is the scene the same as it appeared prior to its removal at the time you were there in the morning? A. Yes, sir.

Mr. Scoville: We offer Plaintiff's Exhibit 20.

Mr. Wilmer: We have no objection.

The Court: It may be received.

(Plaintiff's Exhibit 20 marked in evidence.) [135]

Mr. Scoville: Mr. Wilmer, in the interest of saving time might I show these to you first?

Mr. Wilmer: I take it there are not being tendered to the witness?

Mr. Scoville: I was going to tender them through the witness because I am advised he can identify the photographs and I thought perhaps Mr. Wilmer had seen the patrolman—these same photographs. I am trying to save time.

Mr. Wilmer: To these we have no objection, but as to others we believe there has been no foundation laid and as previously indicated there has been no showing in the matter that the condition of the pavement was the same at the time these pictures were taken as it was at the time of the accident, and not referring now to specific markings, referring to general markings on the pavement.

Mr. Scoville: If Your Honor please, this wit-

(Testimony of Glenn Flake.)

ness testified a few moments ago he remained there throughout the morning hours——

The Court: There is nothing before me now. If counsel can't stipulate that is that.

Mr. Wilmer: May I ask the witness a question for the purposes of this stipulation?

The Court: Very well.

Q. (By Mr. Wilmer): Mr. Flake, prior to the time or subsequent to the time the Hudson automobile was moved off the [136] pavement, I believe that was during the nighttime, was it not?

A. Yes, it was before it had become daylight.

Q. It was set off the pavement first, then later taken into town? A. Yes, sir.

Q. After it was removed from the pavement then there was the normal flow of traffic on both lanes of the pavement, was there not?

A. I was there protecting them from going over the debris and things that were on the north side of the road. There was quite a lot of glass, chrome, things like that on the road.

Q. Now, when the fire truck washed the pavement, Mr. Flake, was there not at that time removed from the general area there everything that was on the highway and wasn't there a broom used to sweep off the highway?

A. I don't recall anyone using a broom. There could have been. I didn't notice.

Q. Do you know the name of the man—maybe this is cross-examination, Your Honor. I think I am going beyond what is proper voir dire.

(Testimony of Glenn Flake.)

Without being committed by the stipulation to the fact that all these various things that appear on here were the result of the accident or related to the accident, we will agree that Mr. Flake will testify these do represent the scene as he saw it that morning. We do object, however, to two of [137] the proposed pictures, not on the basis of improper foundation but upon the basis that they are immaterial and serve no purpose.

Mr. Scoville: At this time the two you refer to I will withdraw.

Mr. Wilmer: To save time, I am sure Mr. Flake would testify these represent the scene as he saw it that morning. Therefore I think we can save time. Yes, to those we are willing to have them admitted on that basis if that is agreeable.

Mr. Palmquist: Will you remove those typewritten slips from the back?

Mr. Scoville: Yes, I will.

The Court: They may be received.

Mr. Scoville: Because they will be referred to, if Your Honor please, from time to time individually if we might mark them consecutively.

The Court: All right, they may be marked beginning with number 22.

(Plaintiff's Exhibits 22 to 34, inclusive, marked in evidence.)

Q. (By Mr. Scoville): Now, Mr. Flake, you have mentioned heretofore the truck that was there

(Testimony of Glenn Flake.)

at that time and place. I will show you Plaintiff's Exhibit 26 in evidence; do you recognize the vehicle?

A. Yes, sir. [138]

Q. And is that the truck? A. That is.

Q. I believe at this time a wheel had been removed, is that right, do you recall?

A. Yes, sir.

Q. Referring to Plaintiff's 27, is this the Hudson automobile? A. Yes, sir.

Q. And was that after it had been removed from the highway? A. Yes, sir.

Q. And the foreground of the picture is the right side of the Hudson, is it not? A. Yes, sir.

Q. Not the driver's side? A. No, sir.

Q. That is the off side? A. Yes, sir.

Q. I will show you Plaintiff's Exhibit 20. Do you recognize that portion of the truck?

A. Yes, sir.

Q. Now, there appears to be some metal, there is metal down under the edge of the wheels, appears to be pushed up under the truck. Do you recall what that was?

A. That was the left front fender and portion of the Hudson.

Q. Left front fender of the Hudson automobile? [139] A. Yes, sir.

Q. Was that under the truck when the truck stopped down here way off the pavement?

A. Yes, sir.

Q. Was that the left front fender of this Hudson automobile? A. Yes, sir.

(Testimony of Glenn Flake.)

Q. Then do you mean it had been carried all the way under the truck? A. Yes, sir.

Q. I show you another picture. Again is this the truck. This is Plaintiff's Exhibit 30, the truck and trailer, semi-truck? A. Yes, sir.

Q. Is it in position off the road as you have heretofore testified? A. Yes, sir.

Q. I show you Plaintiff's 31. Is that another view of your patrol car and the truck and the Hudson? A. Yes, sir.

Q. That is after the Hudson had been pulled down and off the road? A. Yes, sir.

Q. I show you Plaintiff's 32. Is that, too, also a correct picture of the truck and conditions at the time you observed [140] them? A. Yes, sir.

Q. Now, is this picture, number 32, is this looking at the back end, rear end of the truck from a position in here somewhere? A. Yes, sir.

Q. Now, of what is this a picture?

A. That is the Hudson that was involved in the accident.

Q. This is after it had been pulled from the highway, is it? A. Yes, sir.

Q. That is Plaintiff's 33.

I am referring to 34. Do you recognize that photograph? A. Yes, sir.

Q. For the sake of brevity that is another picture of the fender of the Hudson carried all the way under the wheels of the truck?

A. Yes, sir.

Q. I will show you what is marked Plaintiff's 25

(Testimony of Glenn Flake.)

for identification. Do you recognize that photograph? A. Yes, sir.

Q. And that is a view, is it, from the front end of the truck looking back toward the west?

A. Yes, sir.

Q. Is it toward the west?

A. Yes, sir. [141]

Q. That is this view, Plaintiff's 25, is taken from a point about here looking back in this direction (indicating), is that correct? A. Yes, sir.

Q. Referring to Plaintiff's 23, is that also a true and correct depiction of the scene as it existed?

A. Yes, sir.

Q. And this is another view, is it not, taken down in the area looking towards Flagstaff but including the Hudson automobile, after it had been removed by the wrecker? A. Yes, sir.

Q. Now, I show you what has been marked Plaintiff's 28 for identification, and do you recognize that as being the photograph of the north half of the pavement? A. Yes, sir.

Q. And would that be taken looking toward Flagstaff also?

A. Looking toward Flagstaff, looking toward the east.

Q. That is looking toward the direction from which the Hudson was coming? A. Yes.

The Court: What number is that, Mr. Scoville?

Mr. Scoville: I am sorry, 28.

The Court: You called it 28 for identification. You meant 28 in evidence.

(Testimony of Glenn Flake.)

Mr. Scoville: 28 in evidence, I am sorry. [142]

Q. (By Mr. Scoville): I will show you two more, one is 22 in evidence. Do you recognize that also as another photograph of the scene taken that morning?

A. Yes, sir.

Q. If I am correct, for the benefit of the jury, this is looking in the direction in which the Hudson was traveling, is that correct?

A. Yes, sir.

Q. Looking west away from Flagstaff?

A. Yes, sir.

Q. The part of the road we see to the right of the picture—to the left part of the picture, that would be the north half of the pavement?

A. Yes, sir.

Q. That is the direction of travel of the Hudson?

A. Yes, sir.

Q. Now, I show you Plaintiff's Exhibit 24, in evidence. That is the same as the last photograph as to direction, is it, it is looking——

A. This is looking toward the north, kind of a cross-section of the highway.

Q. A cross-section toward the north. And the track marks here are also shown in the last exhibit just mentioned?

A. Yes, sir.

Q. Looking toward the north. You may cross-examine. [143]

Mr. Wilmer: Might I wait until the jury is through examining the pictures?

The Court: Surely.

(Testimony of Glenn Flake.)

Cross-Examination

By Mr. Wilmer:

Q. Mr. Flake, did you make a fairly close examination of the Hudson car that morning after it got light? A. Yes, I looked it over.

Q. Was that after it had been moved off the pavement and onto the side of the traveled portion?

A. It was moved off the pavement before it got light.

Q. That is what I mean. So it had been moved before you made a careful examination of it?

A. I looked it over quite thoroughly before it had been moved. The fellow was still in the vehicle.

Q. I realize that, but I am speaking now of looking at it with the opportunity of examining it carefully, with light and so on, that was after it got light you did that?

A. Yes, after it got light.

Q. Now, as I understand, Mr. Flake, the left front fender of the Hudson, which I presume included the apron, that is where it joined onto the hood, had been literally torn off the Hudson and carried under the truck to where the truck came to rest? A. Yes, sir. [144]

Q. Was that portion of the Hudson under the front end of the truck or was it carried to the back of the truck?

A. It was along about the middle. It wasn't to the rear of the truck or it wasn't under the tractor.

(Testimony of Glenn Flake.)

Q. As I understand this the truck consisted of a tractor with a fifth wheel and a refrigerated box, is that right? A. Yes.

Q. What I am asking you, was it under the tractor or was it under the box, under the refrigerated box, or do you remember?

A. From my recollection I would say it was behind the duals on the tractor.

Q. Behind the drivers? A. Yes.

Q. Did you make an inspection or examination of the tractor or the truck?

A. I looked it over, yes, sir.

Q. What did you observe with respect to the condition of the front wheels of the tractor?

A. Oh, if my memory serves me the front wheels were knocked out from under it, knocked underneath.

Q. The front wheels had been torn loose from their moorings and the front end hammered back almost to the drivers, were they not?

A. That is the way I remember it. [145]

Mr. Wilmer: Would you mark that for identification, please.

(Defendant's Exhibit A marked for identification.)

Q. (By Mr. Wilmer): In making your examination of the Hudson automobile did you make any examination to determine if there was any paint

(Testimony of Glenn Flake.)

marks upon the Hudson that you could ascertain came from any foreign source?

A. No, sir. I wasn't particularly looking for that.

Q. Let me show you Defendants' A, which I do not believe is in this series, but which appears to be a picture taken at the side of the road or at the scene of the accident. Looking at that, can you tell me if that appears to be a view of the Hudson looking directly at it from the side, the side of the damage?

A. Yes, sir.

Q. Now, can you tell me, Mr. Flake, if it is not a fact that the rear fender, rear left fender of the Hudson, was undamaged other than perhaps for—in other words, had not suffered any heavy portion of the impact?

A. There was some damage done to it from an earlier picture I looked at. You don't see too much damage from this picture.

Q. What I am trying to say, Mr. Flake, is this: Examining the Hudson automobile, if we would take one of these pictures here as representing the square vehicle and this representing the left front corner of the left side—— [146]

A. Yes, sir.

Q. Your damage was substantially like this, was it?

A. Yes.

Q. Now, in your examination of the damage to the tractor could you tell me, Mr. Flake, if you have a sufficiently clear independent recollection of the condition of these vehicles now apart from these pictures that you could tell us something about the

(Testimony of Glenn Flake.)

main portion of the damage to the tractor, or would you have to rely on these pictures to refresh your recollection as to the details of the damage?

A. I remember there was damage to the front wheels of the truck. I remember that from my own——

Q. They were torn loose?

A. Yes. Whether they were torn back or bent over I don't recall right offhand without looking at the pictures. There was damage to them and the front bumper was bent up on the left side.

Q. Let me ask you to look at this picture—I picked this up over here but apparently it isn't marked, or is it 30—which is numbered 30. I understand. Would you look at that, please, Mr. Flake, and tell me if it is not a fact or if that refreshes your recollection where you could say as a matter of fact the damage to the front end of the Mack truck was confined to bending back of the bumper, the left front of the bumper? [147]

A. I would say the left side bore the impact of it, if that is what you mean.

Q. Well, maybe I can show you another picture.

We would offer in evidence at this time Defendants' Exhibit A, if it please the Court.

Mr. Scoville: We have no objection to the receipt in evidence of Defendants' Exhibit A.

The Court: It may be received.

(Defendants' Exhibit A marked in evidence.)

(Testimony of Glenn Flake.)

(Defendants' Exhibit B marked for identification.)

Mr. Palmquist: We will stipulate to them all going in, anything you have.

Q. (By Mr. Wilmer): Mr. Flake, I want to show you Defendants' Exhibit B for identification and ask you to examine that and tell me if that refreshes your recollection as to the appearance of the front of the Mack truck? A. Yes, sir.

Mr. Wilmer: Then we offer it, and counsel has agreed it may be received in evidence. We offer it.

The Court: It may be received.

(Defendants' Exhibit B marked in evidence.)

Q. (By Mr. Wilmer): Had it been raining that night, Mr. Flake, or did it rain through the night?

A. I believe it did. As I recall it, it was kind of a damp morning. [148]

Q. Now, I believe that you stated that you had stayed there for the purpose of keeping traffic off the north side of the highway?

A. That is correct.

Q. Looking at 25, Plaintiff's 25, would you then tell me that the tracks and other things we see there were there prior to the accident, on the north side?

A. I would say the tracks weren't there prior to the accident.

Q. I am referring not only to—well, now, do I understand, Mr. Flake, it is your statement that all of the vehicular tracks which appear on the north side of the pavement were there, not there prior

(Testimony of Glenn Flake.)

to the accident, did not occur between the time of the accident and the time the picture was taken and, therefore, were in some fashion related to the accident? A. Well, I will say——

Q. No; I am asking you. You are telling me now all the tracks on the north side of the pavement——

Mr. Palmquist: Could we ask what picture you have there?

Mr. Wilmer: Yes, surely. I am referring to 25, I believe I stated.

Mr. Palmquist: Plaintiff's 25?

Mr. Wilmer: Yes. [149]

Q. (By Mr. Wilmer): Now, do I understand everything that is on the north half of the pavement was there, that it was not there prior to the accident and did not occur between the time of the accident and the time of the taking of the picture?

Mr. Scoville: He hasn't said that as yet.

Mr. Wilmer: I am asking him, Mr. Scoville. Do I understand that as your statement?

A. No. I will say there were tracks made after the accident.

Q. And before the picture was taken?

A. Before the picture was taken, particularly tracks back here like this, that was made by my car coming in.

Q. These tracks through there, you don't know whether they were there before the accident or not; I am referring now to the north half of the pavement to the east of the oil repair, you don't know whether those were there before?

(Testimony of Glenn Flake.)

A. No, I don't know whether those were there before or not.

The Court: At this time, Gentlemen, we will take a recess for about five minutes. During the recess please bear in mind the admonition given you.

(Recess.)

Q. (By Mr. Wilmer): When you arrived at the scene of the accident, do you recall where the two-wheel trailer was?

A. It was off to the north side of the highway, off the [150] road.

Q. How far off?

A. I would say twenty feet.

Q. Did you make any examination of it?

A. Nothing for a report. I just looked at it. I think it was upside down, if I recall.

Q. Do you recall whether or not the tongue, I am referring to now the portion of the trailer that leads out from the trailer and attaches to the car, was bent?

A. I don't recall on that.

Q. You don't recall?

A. No.

Mr. Wilmer: I think I have no further questions.

Redirect Examination

By Mr. Scoville:

Q. Do you know of any close-up pictures being taken of the trailer, the luggage trailer?

A. No, I don't remember any.

Mr. Scoville: That is all.

Mr. Wilmer: No further questions.

(Witness excused.)

PHILLIP R. COOK

called as a witness herein, having been first duly sworn, testified as follows: [151]

Direct Examination

By Mr. Palmquist:

Q. Mr. Cook, your full name is?

A. Phillip R. Cook.

Q. How old are you, Mr. Cook?

A. Twenty-two, sir.

Q. Where do you reside?

A. Flagstaff and the fire hall just temporarily right now.

Q. How long have you lived in Flagstaff?

A. Since 1946.

Q. I call your attention to July 10th of 1954; were you in Flagstaff at that time?

A. Yes, I was.

Q. What was your occupation?

A. Fire department, engineer.

Q. And did you receive a call which took you to a spot some seven and a half miles west of Flagstaff?

A. Yes, sir.

Q. And do you know how you received that call?

A. Yes, sir, I do.

Q. And how did you receive that call?

A. By one of the city policemen came up in the dorm and woke the driver and myself up; and immediately we called the Chief, got an okay to take the truck out of town. So we responded in about two minutes' time.

(Testimony of Phillip R. Cook.)

Q. What was the name of your city police officer that came [152] to you?

A. Cecil Wedgeworth.

Q. Cecil Wedgeworth? A. That is right.

Q. Could you describe the equipment that you took?

A. One 1954 three-quarter ton G.M.C., equipped with a centrifugal type pump powered by power take-off which would, I guess, pump about two hundred pounds with the engine revved close to one thousand r.p.m.'s or better. That is about the size of the truck.

Q. Now, when you drove out there, did you go alone or did the police officer ride with you?

A. Officer Wedgeworth responded with me with a resuscitator.

Q. Can you tell us on your way out there do you remember passing any other vehicles or that passed you?

A. Yes, I passed quite a few vehicles. But there was one patrol car passed me about a half mile before I reached the scene.

Q. Did you see that patrol car at the scene when you arrived there? A. Yes, sir.

Q. Do you know which patrol officer that was?

A. That was Mr. Flake.

Q. When you arrived there, did you see a Mr. Harris, an Army man from the Ordnance Depot at the scene? [153] A. I recall I did, yes.

Q. He was there. Do you remember his wife was there? A. I remember his wife quite well.

(Testimony of Phillip R. Cook.)

Q. I am trying to establish about what time you got there. When you got there were the people that had been in the Hudson still in the Hudson?

A. Yes, sir.

Q. And how many people were there?

A. In the car you mean, sir?

Q. Yes. A. Two.

Q. A man and a woman? A. That is right.

Q. Did you see any other persons that had been occupants of that car? A. No, sir.

Q. If there had been they had been taken away when you got there? A. Yes, sir.

Q. When you got there, did you see some situation that called for your services?

A. Yes, sir; very definitely.

Q. What was that situation?

A. Well, there was a typical fire hazard with all the gasoline over the road and people coming up with cigarettes [154] which definitely created a bad fire hazard.

Q. Now, I will show you Plaintiff's Exhibits Numbers 15 and 16. Do you recognize those pictures? A. Yes, sir.

Q. Was that the position of that Hudson car when you arrived there? A. Yes, sir; it was.

Q. Can you tell me, were you there when that picture was taken? A. Yes, sir.

Q. Was that picture taken before you washed it down or after you washed it down?

A. Actually I washed down about three different

(Testimony of Phillip R. Cook.)

times really. The first time was to wet it down, to knock down the hazard.

Q. We are interested in knowing the pressure that was exerted by the fluid that you used, also the fluid you used. Let's start with the fluid. What type of fluid did you use when you washed it down?

A. Regular water with an additive, wet water it is called. It is used for forest fires. It is a highly concentrated salt.

Q. It is a concentrated salt mixed with water and called wet water? A. That is right.

Q. Gives water a penetrating—— [155]

A. Action, that is all.

Q. What pressure was exerted by this stream of wet water as it washed on the highway, do you know the pounds?

A. I would say the way the truck was equipped then it had no throttle on it so the engine had to idle; like I was saying the top pressure would be about two hundred pounds at certain r.p.m., but at idling r.p.m. it couldn't develop over, I would say, between sixty and seventy pounds and that is not nozzle pressure, that is just gage pressure. Of course you have friction loss in your hose when you have so many feet out.

Q. Do you know what the pressure is on the ordinary garden hose?

A. I would say around, depend on the town, but I would say around forty-five or fifty pounds.

Q. Could we compare the pressure you used——

Mr. Wilmer: Just a moment. It is a matter of

(Testimony of Phillip R. Cook.)

common knowledge that the pressure in water systems varies from six pounds to a hundred. Comparing this to a garden hose is a matter outside the experience of this witness unless he compares it to a particular water system.

Mr. Palmquist: I guess counsel is right. I was thinking about my garden hose.

Q. At least the garden hose you were thinking of was about forty-five pounds. Can you tell us what you think the pressure was as you used it that night? [156]

A. Between forty and fifty pounds.

Q. Before you did this washing, did you observe certain marks and things, debris out there on that highway?

A. There was a certain amount of debris, yes.

Q. Did you observe where those marks and debris were in relation to the center white line of the highway?

Mr. Wilmer: Just a moment. If it please the Court, we have no objection to him testifying what debris was there but we do object to him testifying as to marks unless they are identified and described and related to the accident.

The Court: I think the objection is good. He should describe the marks.

Q. (By Mr. Palmquist): All right. Did you see certain marks out there at the scene of this accident?

A. There was just one large mark that was actually noticeable to me.

(Testimony of Phillip R. Cook.)

Q. I show you Plaintiff's Exhibit 19-A and ask you to look at that. Does that picture look familiar?

A. Yes.

Q. What do you see in that picture?

A. This is the one mark I was thinking of right here, and that here was where the car was sitting after the accident.

Mr. Wilmer: For the purpose of the record, it is very unintelligible and for our purposes also to be unable to see what he is pointing to or [157] describing.

Mr. Palmquist: I will hold it up.

The Witness: This is the line I was referring to here. And here is where the car came to rest in a downhill position.

Q. On the black top, was it?

A. On the black top.

Q. You were pointing to the east edge of that black top, is that where it was?

A. Of the picture.

Q. Do you see the rear end of the trailer down there? A. Yes, sir.

Q. Do you recognize whose patrol car that was in there?

A. That one right there, no, sir, I couldn't tell you. I wasn't there when the picture was taken.

Q. Yes, but do you see some marks on the highway there that were there the night of the accident?

A. Yes, sir.

Q. Were those marks that were shown by this picture there before you did your washing?

(Testimony of Phillip R. Cook.)

Mr. Wilmer: Just a moment, if it please the Court, counsel is not referring to any specific marks. I have no way of knowing and I think the witness has no way of knowing what he is talking about.

Mr. Palmquist: There is a picture of the marks.

The Court: Let him point out the marks he is talking about. Refer to it by number, 19-A, for the record. [158]

Q. (By Mr. Palmquist): Will you take this pen and put some X's on the marks? When you said "marks," point out the various marks.

A. All right. The marks there, actually they are staggered here but those are the marks I remember.

Q. You put X's on them?

A. That is right.

Q. Now, were those marks there before you did your washing?

A. Yes, sir. I was nowhere close to that actually except on the black spot. That was the only place I washed down.

Q. Besides these marks did you see certain debris out there, glass, parts of door handles?

A. Where on the picture?

Q. Any place at the scene of the accident.

A. Around the car, yes.

Q. Around the car. Now, my question is in relationship to the white line, where did you see these marks and this debris?

A. On the north side, sir.

Q. Did you see any marks or debris south of the white line? A. Very little, sir.

(Testimony of Phillip R. Cook.)

Q. Now, when you washed, did those marks that you have marked on there disappear?

A. No, sir; that wasn't where I was washing.

Q. Did any marks disappear as a result of your washing process? [159]

A. I don't believe they could have.

Q. Did you use a broom and do any scrubbing as has been suggested?

A. I used an ordinary house broom to brush a few larger pieces up in two separate piles, one on each side of the car; outside of that that was it.

Q. What were those pieces?

A. Mostly glass, sir.

Q. Was that brushing done on the north side of the highway? A. Yes, sir.

Q. And did you use that broom to scrub away any black marks or gouges on the pavement?

A. No, sir; very definitely I used a broom as little as I had to.

Q. When you arrived out there you say the people were still in the car, is that correct?

A. Yes, sir.

Q. Now, did you help remove them?

A. The lady, sir.

Q. Was the man still in the car?

A. Yes, sir; he was the last one to be taken out.

Q. Was there some difficulty in removing him from the car? A. Yes, there was.

Q. Now, there has been offered in evidence this morning under the defense a picture, Defendant.

(Testimony of Phillip R. Cook.)

Exhibit A. It is [160] rather small. Can you see this all right? A. Yes, sir.

Q. In order to get the driver of that Hudson out, can you answer this yes or no—was any contour of the wreckage changed in order to get him out?

A. Yes, sir, there was.

Q. Would you explain that to us?

A. As I remember the cable there, the tow truck was out there later and the cowl was pulled ahead in order to get the body loose from the dash and also remove him low enough so they could get the door post out of his head.

Q. To get the door post?

A. Actually it is a part of the top off the door.

Q. By the way, do you remember whether or not the driver of that Hudson, when you got there, still had ahold of the steering wheel?

A. I remember that very clearly. He did.

Q. He still had ahold of it? A. He did.

Q. Did you notice whether or not there were a pair of glasses that he apparently had been wearing?

A. They were laying in the seat.

Q. They were laying in the seat?

A. Yes, sir, beside him.

Q. Were they broken or not? [161]

A. I can't remember, sir.

Q. In order then to get him out, the tow truck used a cable of some kind?

A. I remember it being pulled ahead so many inches and the strain was taken off of him.

(Testimony of Phillip R. Cook.)

Q. The top of that car as shown by that picture has been changed in that process?

A. Very little, but, as I say, a matter of inches.

Q. I show you a picture, in fact two pictures now. May I have these marked for identification?

(Plaintiff's Exhibits 35 and 36 marked for identification.)

Q. (By Mr. Palmquist): Were you present when these two pictures were taken? A. Yes.

Q. Do you remember who took those pictures?

A. I don't remember whether it was Bryfogle or Paxton.

Q. Paxton, you say? A. Yes.

Q. Did Paxton take some pictures?

A. I thought he did.

Q. Can you tell me regardless of who took those pictures, are those a fair and true, correct representation of the actual damage that existed to the top of that car and the windshield post and the door post as was shown here in Defendants' A, except for the differences? [162]

A. Yes, sir.

Q. That was before the tow truck had pulled the contour of that wreckage apart, is that right?

A. Yes, sir. Right in here, it was pulled in here and eased the strain in here (indicating).

Q. Does that show also the impalement of the victim? A. Yes, sir.

Q. Does that also show the victim still holding onto the steering wheel?

(Testimony of Phillip R. Cook.)

Mr. Wilmer: Just a moment. That has not been offered in evidence.

The Court: Objection sustained.

Mr. Palmquist: We offer it in evidence at this time.

Mr. Wilmer: We object for the reason previously stated. Your Honor has seen the pictures, they serve no useful purpose. The only effect is to improperly inject the issue of sympathy in the case.

Mr. Palmquist: It is no issue of sympathy. A man asleep would not be holding the steering wheel, your Honor.

The Court: The objection will be sustained.

Mr. Palmquist: We also offered them, if your Honor please, to show the true contour of the shape——

The Court: I sustained the objection for all of the purposes.

Q. (By Mr. Palmquist): Very well. Now, there definitely [163] was damage to the front end of the truck, was there, as shown by Defendants' Exhibit B?

A. There was considerable damage there.

Mr. Palmquist: I understand, counsel, you don't represent this picture as being taken at the scene?

Mr. Wilmer: I don't know what picture you are talking about.

Mr. Palmquist: Defendants' Exhibit B.

Mr. Wilmer: We stated that was not taken at the scene of the accident.

Mr. Palmquist: Can I ask when this was taken?

(Testimony of Phillip R. Cook.)

Mr. Wilmer: I believe it was July 12th, if not that, July 17th.

Mr. Palmquist: It was taken after it had been towed in?

Mr. Wilmer: Behind the—that garage in Flagstaff.

The Witness: Hutchison Motors.

Mr. Wilmer: Yes, Hutchison Motors.

Q. (By Mr. Palmquist): Here is a picture I would like to call your attention to, Plaintiff's Exhibit 30. That was taken at the scene of this accident, was it not? A. It was.

Q. As shown by Defendants' Exhibit B, the left front of that bumper has been pushed right back with considerable force, was it not?

A. Yes. [164]

Mr. Wilmer: If it please the Court, counsel is asking the witness to interpret the picture for the jury. It is up to them to look at the picture and reach whatever conclusion they desire.

The Court: The objection is sustained.

Q. (By Mr. Palmquist): Is this picture here—and I call your attention particularly to the left running board and battery—a correct representation of that truck as it sat out there that night?

A. Yes.

Q. I will ask you the same question—I would like to have the gentlemen of the jury compare these, follow up with these pictures—I will ask you if that is also— A. The same time.

Q. —the same time, at the scene of the acci-

(Testimony of Phillip R. Cook.)

dent, is that correct? A. That is right.

Q. You can recall also, can you, Plaintiff's Exhibit 32 shows the left side of that trailer as it sat on the north side of the highway there that night?

A. That is right.

Q. That is a correct representation?

A. Yes.

Q. If we were looking for damage on the left side of the trailer, if it existed, we might find it on Plaintiff's [165] Exhibit 29, that is a correct representation? A. Yes, it is.

Q. And do you recall what Plaintiff's Exhibit—wait a minute, I thought this one was in evidence—it is Plaintiff's Exhibit 34. Do you remember the left front fender of the Hudson under the spare tires there?

A. I don't remember if it was the fender off the Hudson or not; I do remember the debris under the wheels.

Q. Did you examine the front of the truck, Mr. Ripka's truck out there or that tractor as to any markings, bolts that may have caused certain markings on the Hudson?

Mr. Wilmer: Your Honor, may I have that question, please?

(The last question was read.)

Mr. Wilmer: If it please the Court, we have no objection to him testifying what he saw; we do object to him drawing conclusions.

The Court: Objection sustained.

(Testimony of Phillip R. Cook.)

Q. (By Mr. Palmquist): The question, Mr. Witness, is did you make such an examination, yes or no?

A. I just looked at the truck; I didn't make any examination.

Mr. Wilmer: I am sorry, I can't hear the witness.

The Court: Keep your voice up, please, and talk so the furthest juror can hear you. [166]

The Witness: I looked at the truck that night but I didn't make any inspection.

Mr. Wilmer: Thank you.

Q. (By Mr. Palmquist): I call your attention to Plaintiff's Exhibit 7, which shows the left rear side of the Hudson. Do you see a board impaled into that as shown in that photograph?

A. I see a board in the door, yes.

Q. Is that—did you see that there the night of this accident? A. No, I didn't.

Q. Do you remember a tarpaulin?

A. There was a tarp on this side of the car along with the box of the trailer, setting on this side of the car. The trailer was setting over here, like the car was here, just the box of the trailer. The frame of the trailer was down in the ditch.

Q. You distinguish between the box and the frame, correct? A. That is right.

Q. Would you step down here to Plaintiff's Exhibit 3 and draw in for us, if you will, where the box to that trailer was in relation to the car?

A. This is our truck here.

(Testimony of Phillip R. Cook.)

Q. This is the culvert. This has been drawn in to represent the black patch across the culvert.

A. The car is sitting here and the box still on the highway [167] was sitting approximately in here. There were several large pieces and the contents were all around in here. As I remember, the frame of the trailer was down over here.

Q. I am sure you don't understand. North is to the top, this would be the westbound lane, this would be the eastbound lane.

A. East.

Q. This is the oil surface. This is the edge of the highway out here, guideposts and culvert, and someone has drawn this as having represented the car and this representing the trailer.

A. I see.

Q. You can ignore all markings and put in your own markings. First of all, you draw in with blue where you think you remember the car and its position.

A. I would say the car—this is the culvert then?

Q. Yes, that is a culvert.

A. I would say the car would be right in here.

Q. Just draw it in.

A. I would say this is the car here (indicating).

Q. All right, we will call that "C-1." Now, put in a square to show the box of the trailer.

That would be "C-2." Now, by that, you mean just the wooden part, right?

A. The wooden part and its contents. [168]

Q. All right. Take and draw a line where you saw this tarpaulin or canvas you mentioned.

(Testimony of Phillip R. Cook.)

A. It was lying right in here on the back part of the car.

Q. Up on the car? A. Yes, sir.

Q. One of these pictures I believe shows that. I am referring to Plaintiff's Exhibit 15. Does that show the canvas or tarpaulin you are talking about?

A. That is right. It has been pulled down but it was over the back part of the car.

Q. Will you take and make in ink "X" on that tarp or canvas you are talking about?

A. I can't mark very well.

Q. Maybe a lead pencil will do it. Try this lead pencil.

(Witness indicates on diagram.)

Q. So the "X" is on the tarp of Plaintiff's Exhibit 15. Now, draw in for us, if you will, the frame of the trailer.

A. As I remember it, it was situated over in the ditch about in here. That is down off the shoulder down toward the borrow ditch.

Q. We will call that "C-3."

Now, you may be seated. This thing you have been calling the box "C-2," was that made of wood?

A. Yes, sir.

Q. And do you remember what the color of that wood was? [169]

A. Green, if I remember right.

Q. Green. Do you see this splintered board that appears at the left of this car, Plaintiff's Exhibit 7?

A. I see it.

(Testimony of Phillip R. Cook.)

Q. Would that be about the size of the slats that were in that box you have drawn up there, "C-2"?

A. I couldn't say for sure. I believe they were a little larger.

Q. Here is Plaintiff's 24, over the bank, do you see something there that——

A. Part of the debris from the trailer.

Q. Part of the debris from the trailer?

A. That is right.

Q. Can you make a "X" or arrow pointing to that for us?

(Witness indicates.)

Q. So the "X" you have drawn on Plaintiff's 24, was that the frame or the box?

A. I couldn't say.

Q. But it was part of the debris?

A. It was part of the debris.

Q. Mr. Cook, here is a picture, Plaintiff's Exhibit 10 for identification, it was taken of the Hudson in the garage and it shows the right side of the Hudson. But I want to call your attention particularly to the right headlight. Can you tell me whether or not that would correctly represent to you [170] the right side of that Hudson as it was after that accident?

A. I wouldn't say. I was too busy trying to get the woman out to actually look at the car on this side, because I knew it wasn't hurt very bad.

Q. Can you recall whether or not the right headlight wasn't even broken?

(Testimony of Phillip R. Cook.)

A. I wouldn't say.

Q. Well, would you look at this one which is Plaintiff's 9 for identification, where you can see the left side of the damage in which it does show the right headlight?

A. It apparently is there.

Q. Does that refresh your memory?

Mr. Wilmer: Is that in evidence?

Mr. Palmquist: No, these are not in evidence.

Mr. Wilmer: Now, if it please the Court, counsel is tendering exhibits that are not in evidence, asking him to testify to their contents and refresh his recollection.

Mr. Palmquist: I am asking him to refresh his recollection so he could testify to the truth and accuracy of these.

The Court: If you are going to test his memory you should first be satisfied that he needs it.

Q. (By Mr. Palmquist): Could you help me with these pictures? Whether or not this Plaintiff's 9 would be a true and correct representation of that Hudson? [171]

A. As close as I can remember.

Mr. Palmquist: We will offer that picture in evidence at this time.

Mr. Wilmer: We don't believe there is any foundation laid, your Honor, but I don't believe it is worth quibbling over. This picture does not conform to the others that are in evidence.

The Court: You are not objecting to 9, is that right?

(Testimony of Phillip R. Cook.)

Mr. Wilmer: Maybe I had better look at it. Might I look at a couple of the other pictures? We have no objection to either of them.

Mr. Palmquist: We offer both in evidence, 9 and 10.

The Court: They may be admitted.

(Plaintiff's Exhibits 9 and 10 marked in evidence.)

Q. (By Mr. Palmquist): Can you tell me whether or not this—I am pointing to what looks like might be a hose or could be a rope or cable in Plaintiff's Exhibit 15, I was wondering if that is your fire hose, or what that is?

A. I will have to look at it. No, that is a tow cable off the tow truck.

Q. That is a tow cable off the tow truck?

A. Right.

Q. By the way, I notice a man, I can just see a profile here, maybe you know who that man is.

Who is that man? A. This picture? [172]

Q. Yes. A. Mr. Veazey.

Q. And who is Mr. Veazey?

A. He was the man that responded with the wrecker that night.

Q. Can you tell me is the victim still in the car there? A. Yes, he is.

Q. In Plaintiff's 15? A. Yes.

Q. They are getting ready to pull the wreckage apart, is that it?

A. That is right; pull the cowl ahead.

(Testimony of Phillip R. Cook.)

Q. Did you find some personal property of the victim's that was in this Hudson, scattered around there? A. Yes, sir.

Q. Could you tell us what kind of personal effects you observed that were scattered?

Mr. Wilmer: That is immaterial, if it please the Court. There is no objection to testifying where they were, but I see no point in going back into these same little suggestions that there were children's toys, something like that.

Mr. Palmquist: Counsel reads too much into the importance of this. If your Honor please, this will become important.

Mr. Wilmer: Very well, withdraw my objection on counsel's [173] statement.

Mr. Palmquist: Among other things——

The Court: Counsel has withdrawn the objection. Go ahead.

Q. (By Mr. Palmquist): What kind of personal effects did you observe?

A. Just the average family's goods, household goods.

Q. Did you help pick up some of the things?

A. Some of the stuff that was out and large stuff, had quite a bit of help out there, but there were several of us picked the things up. I can't recall what it was.

Q. Can you recall anything at all you picked up, any one thing?

A. There were some birthday napkins, I distinctly remember that.

(Testimony of Phillip R. Cook.)

Q. Birthday napkins? A. Yes.

Q. Do you know where you found them?

A. They were on the right side of the car and also in the front seat.

Q. Do you remember picking up a camera or seeing a camera picked up?

A. Yes; Officer Wedgeworth found a camera.

Q. Do you know where that was found?

A. No; I couldn't tell you. [174]

Q. All right. Do you know in relationship to the center line where was this property found, these various effects?

A. On the north side.

Q. All on the north side of the center line; that would be the westbound lane then?

A. That is right.

Q. Then in relationship to this ditch or off the highway where the trailer went, off on the north side and off of the highway, was any of it found over there out where the frame of the trailer went?

A. Miscellaneous small articles were scattered around in back of the car, yes.

Q. Then I am particularly interested in as to west of that point, going westerly or where the car was stopped where you washed the gas from under the car, did you find any of these things scattered westerly of there and also out in the ditch?

A. There were a few small articles, what they were I don't know. There wasn't very much because I pulled the fire truck on west of the wreckage.

Q. All right. You may cross-examine.

(Testimony of Phillip R. Cook.)

Mr. Wilmer: It will take a little more than fifteen minutes, if your Honor please.

The Court: We will recess until 1:30. Please be back promptly. Bear in mind the admonition given you heretofore. [175]

(Whereupon, a recess was taken at 11:45 a.m. until 1:30 o'clock p.m.)

Cross-Examination

By Mr. Wilmer:

Q. Mr. Cook, how long after you arrived at the scene of the accident did you start wetting down the area where the gasoline was?

A. Almost immediately, sir.

Q. How long did you continue that?

A. I would say about five minutes.

Q. Do you think it might be as much as ten minutes? A. No, sir.

Q. You stated you used water under a pressure of forty to fifty pounds? A. Correct.

Q. It would not be as much as seventy-five pounds? A. No, sir, it wouldn't.

Q. Now, how large an area of the pavement, Mr. Cook—and I am referring now from east to west——

A. East to west.

Q. ——how much of an area of the pavement did you cover with the so-called wet water solution?

A. Including the car I would say about five feet on the east side.

Q. Not as much as thirty feet? [176]

(Testimony of Phillip R. Cook.)

A. Across, yes.

Q. I am speaking of east and west.

A. Not east and west, no, sir.

Q. How far from the car to the east would you say there was scattered along the highway articles of personal property? A. To the east?

Q. Yes. A. I don't know offhand.

Q. How wide was the highway there?

A. I don't know, sir.

Q. Well, would the area the size of the width indicated on the exhibit there of, I believe it is twenty-two feet pavement and eight-foot shoulder on each side, seem about right to you?

A. Yes, sir.

Q. After you finish wetting down the area there on the road which you say you did wet down, what did you do then?

A. I think the next thing was the ambulance arrived and we started to get the woman out of the car.

Q. And when that was completed, what did you do?

A. I think we picked up a bunch of the scattered articles and put them behind the car out of the way.

Q. You had started, with the others who had come to the scene of the accident and had gathered from the highway and along the highway articles from the automobile? [177]

A. And the trailer, yes.

Q. There were quite a number of people there at the time helping you?

(Testimony of Phillip R. Cook.)

A. That is true, yes.

Q. How long did that take?

A. I couldn't say.

Q. It was done promptly, I presume?

A. That is right.

Q. When you arrived there it was about 3:10, was it?

A. I imagine it was. I don't remember just what time the alarm came in.

Q. It was dark at that time? A. True.

Q. Did you leave before it got light?

A. Yes, sir, I did.

Q. So all the time you were there it was dark?

A. That is right.

Q. Did you see any skid marks at any time while you were there?

A. Behind the automobile on the north lane.

Q. You saw skid marks?

A. Yes, sir; to the east.

Q. Did you say anything then to Roy Bryfogle, the patrolman? A. I can't say I did. [178]

Q. Did you make a remark to him you could not see any skid marks there?

A. I can't recall, sir.

Q. You do not recall. I believe you also took a broom and swept some debris and other matter off of the pavement, did you not?

A. That is right, sir.

Q. When did you do that, do you remember?

A. That followed after I believe we got the lady

(Testimony of Phillip R. Cook.)

out of the car. It was done all the time we were picking the stuff up.

Q. It is your statement definitely at this time you saw skid marks there, is that correct?

A. Yes, sir.

Mr. Wilmer: Would you mark that, please?

(Defendants' Exhibit C marked for identification.)

Q. (By Mr. Wilmer): Mr. Cook, I hand you what has been marked Defendants' Exhibit C for identification and ask you to examine this and tell me whether or not your signature appears on each page, and also if your signature appears twice at the bottom of the second page and if each of those is your signature? A. Yes, sir, they are.

Q. Mr. Cook, on the side on the margin I notice on page 1 there has been a correction made with some initials opposite it? [179] A. Yes.

Q. Are those your initials?

A. Yes, sir, they are.

Q. Referring to page 2, I note there have been two corrections made with initials appearing opposite those corrections. Are those your initials?

A. Yes, sir, they are.

Q. I presume, Mr. Cook, that because you made these corrections you read the instrument before you signed it? A. I didn't write it, sir.

Q. You read it?

A. I didn't read it after it was written, no, sir.

Q. Why did you make the corrections?

(Testimony of Phillip R. Cook.)

A. I didn't make the corrections, sir.

Q. Why are your initials at the side of the corrections? A. I was asked to place them there.

Q. You signed below a certification you had read it?

A. I guess so. He said to sign it so I did.

Mr. Palmquist: May I see it, counsel? Can I ask counsel who took this statement?

Mr. Wilmer: I don't believe it is a matter of consequence, your Honor. The statement is signed by the witness on each page and the certification signed at the end that he had read it and signed it.

Mr. Palmquist: He said he didn't read it, your Honor. [180]

Mr. Wilmer: It becomes a matter then of the jury determining the weight and credibility to be attached to it.

The Court: May I see it? I think the witness should be allowed to read it.

Mr. Wilmer: I have no objection to him reading it.

The Court: It may be admitted. The witness may read it if he desires.

Mr. Wilmer: I propose to read it to the jury, your Honor, then I will give it back to the witness for examination, if that is satisfactory.

(Defendants' Exhibit C marked in evidence.)

Mr. Wilmer: It is headed: "Flagstaff, Arizona, July 26, 1954. Statement of Phillip Cook. I am Phillip Cook, I am twenty-one years of age, my

(Testimony of Phillip R. Cook.)

address is Box 330, Flagstaff, Arizona. I am married and have two children. I have lived in Flagstaff the past eight years and this is my home. My parents live in Claremore, Oklahoma. On July 10, 1954, at about 3:10 a.m. I was called to the scene of an accident about seven or eight miles west of Flagstaff, Arizona, on U. S. Highway 66. I was not more than about five minutes going out to the scene. A City Police Officer," the word "Ray" has been crossed through and there are initials on the side. "P.R.C." That was the correction I referred to in the first statement. That is crossed out and changed to "Mr. Wedgeworth was in the fire truck with me. A couple of patrol cars were there [181] when I got there, and the injured children had already been moved. Within a few minutes after I got there, I started washing the pavement with water from the first truck which has 'wet water' added. The 'wet water' helps to penetrate. I was using about seventy-five pounds pressure on the hose and water I put on the road. The gasoline was all over the road and running across the road toward the south side of the road. It was coming out of the Hudson, which was on the north edge of the pavement, about half on the pavement and half off the pavement." There again a correction with initials on the side. "I washed the road about ten minutes and covered about thirty-five or forty feet area across the road in front of the Hudson. Then I helped clean off the highway, and swept the highway, cleaned off the glass, broken metal," correction with initials at the

(Testimony of Phillip R. Cook)

side of it. "Household goods, etc. I was there when the dead people were moved. The traffic was just using one lane of the highway, which was the south lane, or eastbound lane of the highway. The chassis of the luggage trailer was on the north side of the highway, I would guess about fifteen to twenty feet off the pavement. I was out there at the scene of the accident about two hours or more. I have been a wrecker driver for several years, and I have been to the scene of many accidents. I could not see any skid marks at all. I commented to Roy Bryfogle that there were no marks, and he said, 'I can't [182] see any.' That was while it was still dark, and I left the scene before it got good daylight. I guess I got to town about 5:00 a.m. The portion of the highway which I washed was an oiled patch on the highway, where the accident took place. I had a lot of help in cleaning off the road. Doug Paxton, Shelby McCauley, and a lot of other people were helping. When the ambulance parked to pick up the dead driver and his wife, it parked on the north lane of the highway in the westbound lane of traffic. All the time I was there the traffic was using the eastbound, or south, lane of the highway. I used both the water and a broom to clean the highway. Phillip R. Cook.

"I have read my above statements of three pages, each page of which I have signed, it is a true statement." Signed: "Phillip R. Cook."

We have no further questions.

Mr. Palmquist: I have no questions.

The Court: That is all; you may step down. May this witness be excused?

Mr. Wilmer: Yes, your Honor.

(Witness excused.)

CECIL LEWIS WEDGEWORTH

called as a witness herein, having been first duly sworn, testified as follows: [183]

Direct Examination

By Mr. Palmquist:

Q. Would you state your full name?

A. Cecil Lewis Wedgeworth.

Q. What is your age, please?

A. Twenty-eight.

Q. Where do you reside?

A. Flagstaff, Arizona.

Q. How long have you resided there?

A. A little over two years.

Q. And are you a married man?

A. Yes.

Q. With a family? A. Yes.

Q. What is your occupation?

A. I am a policeman.

Q. How long have you been a policeman?

A. Be five years next month.

Q. And what department are you associated with?

A. I am with the Flagstaff Police Department.

Q. Were you in that position on July 10, 1948—I mean 1954, I beg your pardon?

A. Yes.

Q. The day of the accident between the refriger-

(Testimony of Cecil Lewis Wedgeworth.)

ator truck and a Hudson, seven and a half miles west of Flagstaff, do you recall that? [184]

A. Yes.

Q. Did you go to the scene of that accident?

A. Yes.

Q. When did you first learn of that accident?

A. I don't recall the exact time.

Q. How did you learn of it?

A. The accident was reported to the police department by a tourist traveling through.

Q. Was it as a result of that report that you went out there? A. Yes, sir.

Q. Do you remember what the report was?

A. Yes, the report stated——

Mr. Wilmer: If it please the Court, it is immaterial what someone told him at the police department. We have no question but what he went out there in response to a report. That is all that is material.

The Court: The fact of the report is all that is material.

Q. (By Mr. Palmquist): How did you go to the scene of the accident?

A. In the emergency fire truck.

Q. Were you with Phil Cook? A. Yes.

Q. Who drove out there? [185]

A. Phil Cook drove the truck.

Q. On the way out do you remember a patrol car passing you? A. Yes.

Q. What kind of a car?

(Testimony of Cecil Lewis Wedgeworth.)

A. It was a Ford highway patrol car. I don't remember the year.

Q. When you arrived at the scene of the accident was there a patrol officer there? A. Yes.

Q. And how many officers?

A. There were two patrol officers there when I arrived.

Q. And who were they?

A. Roy Bryfogle and Glenn Flake.

Q. What did you do when you arrived out there?

A. I assisted the driver of the fire truck to get his rig started. There was a lot of gasoline on the pavement. Also I assisted in removing the bodies from the wreckage.

Q. Did you see some marks on the highway?

A. Yes.

Q. As a police officer have you had occasion to investigate accidents? A. Yes.

Q. Have you had some training in that regard?

A. Yes.

Q. Have you had experience in that [186] regard? A. Yes.

Q. And do you know what is meant by the point of impact? A. Yes, I do.

Q. Have you had some training regarding the establishing of the point of impact? A. Yes.

Q. Would you indicate what kind of evidence you looked for to establish the point of impact?

A. The violent skid marks and breakage of glass, dirt that comes out from under the fenders

(Testimony of Cecil Lewis Wedgeworth.)

of cars and little debris that falls off at the point of impact.

Q. Are gouge marks in pavement a significant factor?

Mr. Wilmer: If it please the Court, this is getting outside the realm of this lawsuit and speaking generally of investigation of lawsuits, which is immaterial, or the investigation of accidents, which is immaterial. It may be significant in one case and completely insignificant in another.

The Court: I will let him answer this question.

Q. (By Mr. Palmquist): Would you answer the question?

A. Yes; I think gouge marks could be definite——

Q. Did you find or see any physical evidence out there where this accident took place which would establish a point of impact?

Mr. Wilmer: We object to that, if it please the Court, [187] on the ground that we have no objection to him testifying what he saw there——

Mr. Palmquist: He can answer yes or no.

Mr. Wilmer: Just a moment. No, if it please the Court.

The Court: The witness should be permitted to describe what he saw out there.

Q. (By Mr. Palmquist): Would you tell the Court and jury what you saw when you arrived out there, when you arrived at the scene of the accident?

A. When I arrived at the scene of the accident the Hudson car was in the westbound traffic lane

(Testimony of Cecil Lewis Wedgeworth.)

somewhat of an angle headed to the southwest. I don't know how far it was from the center line, I didn't make any measurements. There was quite a bit of debris around the car, both sides of it. And I noted there was a truck in the ditch somewhat to the east of the car.

Q. About how far to the east of the car?

A. I would imagine a couple of hundred feet.

Q. About two hundred feet?

A. I didn't measure it.

Q. And did you estimate as you looked at the Hudson whether or not any of the rear end of that car was off the paved portion of the highway?

A. I think the whole rear end was on the pavement. [188]

Q. Now, we have some pictures here in evidence. With relation to a black patch on the highway, did you determine where the Hudson was in relation to that patch?

A. The Hudson was partially on the black patch of pavement and part of it off.

Q. And how much of it was on the black patch?

A. Just the front end of the car.

Q. Just the front end. And where was the rear end of it?

A. The rear end of the car would be back on the lighter colored pavement and further toward the shoulder on the north.

Q. There is a white center line down that pavement, is that correct? A. Yes.

(Testimony of Cecil Lewis Wedgeworth.)

Q. In relationship to that center line, where did you find this debris that you have spoken about?

A. The debris was plastered on the left side of the vehicle, also scattered up and down the north side of the road.

Q. What kind of debris, when you say debris, what kind of debris did you find plastered, as you put it, on the left side of the vehicle?

A. A portion of a load they had in a two-wheel trailer, the tarp it was covered with and papers and the wrappings and such, the packages in the load had been wrapped with.

Q. And did you find any portion of the trailer near that car? [189]

A. It seems part of the box of the trailer was in the debris that was stacked against the car.

Q. And did you find what became of the trailer proper or the frame of the trailer?

A. The chassis of the trailer was up in the borrow ditch on the north side of the road, on the west side of where the car came to rest.

Q. Now, did you find any marks such as have been indicated here in Plaintiff's Exhibit 19-A?

A. I didn't look for marks. There were skid marks. It wasn't my job to look for them; however, there were a good number of skid marks around there.

Q. Can you tell us on which side of the center line those skid marks were?

Mr. Wilmer: We object to that. No foundation, if it please the Court.

(Testimony of Cecil Lewis Wedgeworth.)

Mr. Palmquist: I will withdraw that question.

Q. (By Mr. Palmquist): Did you see any debris or marks of any kind south of the center line in the eastbound lane? A. No.

Q. Did you see any marks or debris in the westbound lane, which is north of the center line?

A. Yes, I did.

Q. Did you see those things before the washing process began? A. Yes. [190]

Q. Did any of those marks where the washing process took place disappear?

Mr. Wilmer: Just a moment. If it please the Court, we object to that as being no foundation laid. The witness has not testified he examined the pavement. He said he didn't examine it for marks. Now counsel is asking him if any marks disappeared or didn't disappear in the course of the washing.

Mr. Palmquist: He said he saw marks.

The Court: I will let him answer.

Q. (By Mr. Palmquist): You may answer.

A. I don't think any of the marks that I saw disappeared.

Q. Can you help us with what force that stream of water, wet water, I understand it is called, struck the pavement?

A. About the same as an ordinary garden hose.

Mr. Wilmer: I move to strike that as being not responsive, if it please the Court.

The Court: It may be stricken. The jury will disregard the answer.

(Testimony of Cecil Lewis Wedgeworth.)

Q. (By Mr. Palmquist): Was it forcible or can you tell us in pounds, give us some idea?

A. I don't know what force the pump would put out. The force wasn't very great.

Mr. Wilmer: We object to that, if it please the Court, as his conclusion. He has stated he didn't know what the pump [191] would do and then attempts to testify with what force the water came out.

The Court: It may stand.

Q. (By Mr. Palmquist): How long did you stay out there at the scene of the accident?

A. I stayed until the coroner had arrived, made his investigation and both bodies had been removed.

Q. Was it still dark or had it gotten daylight by the time you left?

A. It was beginning to get light when we left.

Q. Were some photographs taken while you were out there? A. Yes.

Q. Had traffic started to move past the scene of the accident by the time you left? A. Yes.

Q. And how was that traffic moving past the scene of the accident, can you tell us?

A. The traffic was directed past the scene of the accident on the eastbound lane south of the accident.

Q. Was any of that traffic allowed north of the white line? A. I don't recall that it was.

Q. We have some pictures taken the next morning which show both vehicles. I just want to make certain; I call your attention to Plaintiff's Number

(Testimony of Cecil Lewis Wedgeworth.)

31. You see the rear end of the trailer down [192] there? A. Yes.

Q. Is that the approximate position, if you recall, where the trailer ended? A. Yes, it is.

Q. Then you see there is a patrol car parked in front of the trailer there? A. Yes.

Q. That is looking toward Flagstaff. Then you notice on the north side of the highway there is a wreckage of some kind. Can you identify that wreckage?

A. It looks like the Hudson car that was involved in the accident.

Q. Is that the position of that Hudson car when you arrived out there with Bill Cook that night, is that where it was? A. No, it is not.

Q. If that is the Hudson car it has been moved then, is that correct? A. Yes.

Mr. Palmquist: You may cross-examine.

Cross-Examination

By Mr. Wilmer:

Q. Mr. Wedgeworth, after you arrived there how soon did Mr. Cook start wetting down the pavement?

A. Just as soon as he could get his pump started and hose out. [193]

Q. In other words, he did nothing after he arrived there but start getting his hose out and start wetting down the pavement?

A. As I recall that is correct.

(Testimony of Cecil Lewis Wedgeworth.)

Q. How large an area did he wet down?

A. Just a small area underneath and south of the car where the gasoline ran out.

Q. How small an area would you say?

A. Probably an area about eight feet wide.

Q. Eight feet wide. Now, during that time, Mr. Wedgeworth, what were you doing?

A. I assisted in removing the woman in the back seat of the car. I believed she might still be alive.

Q. Had the ambulance arrived by then?

A. The ambulance arrived then.

Q. It was dark I presume when you got there?

A. Yes, it was.

Q. And continued dark until you left, did it?

A. It was getting light when we left.

Q. You left with Mr. Cook, I presume?

A. Yes.

Q. How long would you say you stayed there?

A. I would say an hour, maybe a little over.

Q. The first thing you said you did was to get the woman out of the car, is that correct? I mean, that was your first [194] activity, let me put it that way?

A. Yes.

Q. Did you start that immediately when you arrived there?

A. The ambulance arrived right behind us. There was a nurse there and as soon as we could get the stretchers out we removed the body.

Q. You promptly proceeded to remove the body and put her in the ambulance?

A. Yes.

Q. And the ambulance left?

A. Yes.

(Testimony of Cecil Lewis Wedgeworth.)

Q. I believe it is your statement you left then as soon as the body was removed, taken away?

A. No, sir.

Q. I thought I understood you to say a minute ago that was the case?

A. I said I left after both bodies had been removed and the coroner was through with his investigation.

Q. How long after the body of the driver was removed did you leave?

A. I don't really know.

Q. Did you participate in any examination made by the Highway Patrol at that time as to what was on the pavement? A. No.

Q. From the point where the Hudson car was resting how far [195] back to the east would you say there was household goods and similar matters thrown along the pavement?

A. I don't know; I didn't measure it.

Q. I appreciate that, but was it five feet or was it as much as thirty feet?

A. It could have been as much as thirty feet.

Q. Was all of the debris and so on on the pavement cleaned off pretty promptly, the people lend a hand in removing it?

A. No; it wasn't cleaned off immediately.

Q. How soon was it cleared off?

A. I don't know. The debris was still, a good part of it on the highway when I left.

Q. After Mr. Cook and you left it was still on the highway? A. Some of it was.

Q. How much of it?

(Testimony of Cecil Lewis Wedgeworth.)

A. The items which had no particular value were left there.

Q. Left laying on the highway?

A. On the shoulder.

Q. I am interested in knowing just whether or not before Mr. Cook left there had been completed the matter of removing from the highway the items that had been strewn along the highway, do you remember or do you not remember?

A. A good portion of the items were still there when we left.

Q. I see. Now, Mr. Wedgeworth, did Mr. Cook do anything [196] toward sweeping the debris off the pavement?

A. No.

Q. He did not. That is all.

Mr. Palmquist: May this witness be excused?

Mr. Wilmer: Surely.

(Witness excused.)

Mr. Palmquist: At this time, if your Honor please, we will call the defendant, Gilbert Ripka, as an adverse witness.

GILBERT RIPKA

called as a witness herein, having been first duly sworn, testified as follows:

Cross-Examination

By Mr. Palmquist:

Q. Your full name is Gilbert Ripka, is that correct?

A. That is correct.

(Testimony of Gilbert Ripka.)

Q. Mr. Ripka, you have been in Court as all of these witnesses have testified concerning this accident, is that correct? A. Yes, sir.

Q. Mr. Ripka, you were the driver of that refrigerated truck? A. Yes, sir.

Q. That was involved in this accident?

A. Yes, sir. [197]

Q. Do you remember the accident?

A. Yes, sir.

Q. By the way, Mr. Ripka, where do you live?

A. I live in Kewanee, Illinois.

Q. Where did that trip start, this particular trip? A. The beginning of the whole trip?

Q. Yes.

A. It started in, I believe it started at Laurens, Iowa.

Q. You had crossed various state boundaries, had you not? A. Yes.

Q. You had gone from Iowa out to California. is that correct? A. Yes, sir.

Q. What date did that trip start?

A. I don't believe I could answer that without referring to a calendar.

Q. Had you been on the road a month or a week or days? A. About a week and three days.

Q. About ten days?

A. About ten days, yes, sir.

Q. Now, when you got out to the west coast you landed in San Francisco, is that correct?

A. I landed at Alameda.

Q. Alameda? A. Yes, sir. [198]

(Testimony of Gilbert Ripka.)

Q. You unloaded there? A. Yes, sir.

Q. What did you haul to Alameda?

A. Army eggs.

Q. Army eggs. You were working for Wilson Brothers Trucking Company? A. Yes, sir.

Q. Where are they located?

A. Carthage, Missouri.

Q. They have trucks such as this hauling various types of equipment? A. Yes, sir.

Q. When you unloaded at Alameda what did you do?

A. Proceeded to San Jose where I stopped over and called our office.

Q. And you were told to stay at San Jose until they got some instructions? A. Yes, sir.

Q. And you did stay over at San Jose?

A. Yes, sir.

Q. Where did you stay in San Jose?

A. I believe it was the Colonial Motel.

Q. Where did you leave your truck?

A. It was parked on a parking space on the side of the road across from the Colonial Motel. [199]

Q. The first morning you phoned in, and were given some instructions; is that correct?

A. I phoned in, but they had no instructions at that time yet.

Q. When did you finally get some instructions?

A. I got instructions, it was about 2:30 or 3:00 in the afternoon.

Q. That was July 8th?

A. No, sir. July 7th.

(Testimony of Gilbert Ripka.)

Q. July 7th. And those instructions told you to go down to Santa Paula? A. Yes, sir.

Q. When did you get to Santa Paula?

A. I arrived at Santa Paula the morning of the 8th.

Q. That is about a three-hundred-mile trip; is it?

A. Yes, sir.

Q. You had driven all night; had you?

A. No, sir.

Q. How many hours did it take you to drive down there? A. About eight hours.

Q. Did you get to bed about 1:00 or 2:00 o'clock, the morning of the 8th?

A. I drove part way down there. I drove within about fifty miles of Santa Paula, and we stopped and slept.

Q. Where? In Ventura? [200] A. No.

Q. Santa Barbara?

A. Just north of Santa Barbara.

Q. Ollum or some place like that?

A. No, we stopped right on the coastline.

Q. You slept out, that night?

A. Yes, sir.

Q. And you slept under your truck?

A. Yes, sir.

Q. The boy slept in the truck?

A. My son slept in the truck; yes, sir.

Q. This truck had no regular sleeping unit?

A. No, sir.

Q. He just slept on the seat? A. Yes, sir.

(Testimony of Gilbert Ripka.)

Q. He was small enough, he could just lay on the seat?
A. Yes, sir.

Q. That was the morning of the 8th; was it not?

A. Yes, sir.

Q. And how much sleep did you get that night?

A. Oh, I believe it was about 11:00 p.m. when we stopped and it was around 8 when I woke up.

Q. You think you got a good nine hours sleep?

A. Yes, sir.

Q. You slept all right; did you? [201]

A. Yes, sir.

Q. Did you have a sleeping bag or a mattress you slept on?
A. I had a thick Army comforter.

Q. How thick was the Army comforter?

Q. Doubled up, it would be sufficient to a light mattress.

Q. Did you tell me whether you had any fog on the coast there that night; July 8th?

A. There was some fog there, that night on the coast.

Q. Didn't you get a little cold?

A. No; not there I didn't. Not the point I slept, I didn't.

Q. You slept well; did you?

A. Yes, sir; very well.

Q. You woke up well refreshed; ready for a good day's work?
A. Yes, sir.

Q. You started out with your boy, and drove over to Santa Paula?
A. Yes, sir.

Q. When you got to Santa Paula, you reported to one of those lemon ranches; something like that?

(Testimony of Gilbert Ripka.)

A. I called Sunkist Growers in Los Angeles.

Q. And they told you which warehouse to go to?

A. Yes, sir.

Q. You took on some fresh produce?

A. Took on boxed lemons.

Q. Boxed lemons? [202] A. Yes, sir.

Q. Did you fill your refrigerator box with these boxed lemons? A. No, sir.

Q. Do those have to be iced? A. Yes, sir.

Q. And did you get ice, too, at Santa Paula?

A. Yes, sir; a small amount.

Q. What time did you leave Santa Paula?

A. It was about 11:00 p.m.—or 11:00 a.m., rather.

Q. Just before noon? A. Yes, sir.

Q. And do you know what your gross weight was? A. I don't remember.

Q. Could I ask you this; how long was your equipment, from bumper to rear?

A. From the bumper to the rear of the trailer?

Q. Yes.

A. Forty-five feet, ten inches.

Q. Forty-five feet, ten inches long. And can you tell me how wide your box, refrigerator box was?

A. The trailer?

Q. Yes. A. Ninety-four inches.

Q. Ninety-four inches. And how long was the tractor part? [203] This is the complete outfit here; forty-five feet? A. Yes, sir.

Q. Just the trailer part; how long is that?

(Testimony of Gilbert Ripka.)

A. The trailer part was thirty-four feet, four inches; outside measurement.

Q. And what is the length of the—is that the trailer? A. Yes, sir.

Q. The tractor is what?

A. What would you have reference to; from what part?

Q. The tractor; the motor part; the complete unit.

A. I couldn't tell you that, because I have never measured it.

Q. About fifteen feet? It would be the difference—no. A. No, sir.

Q. Because this overlaps? A. Yes, sir.

Q. How much of it overlaps?

A. The fifth wheel was mounted fifty-five inches from the back of the cab. It also had what we call a thirty-four inch kingpin on it. The center of the fifth wheel was fifty-five inches—fifty-four or fifty-five inches from the back of the cab; had a standard kingpin setting, which is thirty-four inches for that type trailer.

Q. Now, can you tell me—let's start at the back of that refrigerated equipment, and count forward. How many wheels [204] are there on that equipment? A. You mean axles, or wheels?

Q. Actual wheels. Let's take the axles first. How many axles? A. Four axles.

Q. That is on just the refrigeration equipment?

A. Two axles on the refrigeration.

Q. Two axles there? A. Yes, sir.

Q. Those are at the very rear of the refrigeration

(Testimony of Gilbert Ripka.)

equipment? A. No, sir.

Q. Where are they located?

A. The center of the tandem, I believe, was one hundred one inches from the back of the trailer.

Q. About ten feet—nine or ten feet from the rear of the trailer, forward?

A. Eight ninety-one inches, or one hundred one inches.

Q. To the first axle?

A. No. It would be to the center of the tandem axle. The tandem axles are forty-one inches apart.

Q. So the trailer has only two axles?

A. Yes, sir.

Q. How many wheels on each axle?

A. Two. [205]

Q. On each side? A. Two wheels.

Q. So that you had a pair of duals on each side of the trailer? A. Yes, sir.

Q. Now, how many axles on the tractor?

A. Two.

Q. Just the driver axle, and the—

A. Steering axle.

Q. Steering axle. You had duals there, too?

A. On the drive axle; yes.

Q. What is the tread on those tires you had at that time; how wide would it be?

A. I believe those treads are ninety-four inches.

Q. You mean from the center of tread to center?

A. No; the outside of the dual.

Q. The outside of the dual, to the outside of the next dual? A. Yes, sir.

(Testimony of Gilbert Ripka.)

Q. How wide were the tires that were on those?

A. You mean how wide the duals were?

Q. Yes. No; just each tire. I don't mean the duals, but just each tire.

A. They have been measured, but I don't recall.

Q. They would leave a considerably wider mark than an ordinary automobile tire would they [206] not?

A. Yes, sir.

Q. And how much did this equipment weigh, when you finally reached the point where this accident happened, with the load you had?

Mr. Wilmer: You mean the load and the equipment?

Mr. Palmquist: Gross weight; everything.

A. That I couldn't tell, because of the reloading and melting of the ice.

Q. (By Mr. Palmquist): Can you come within a couple of thousand pounds of it?

A. When the truck was loaded and iced fully, at Bakersfield, the gross weight was fifty-eight thousand, eight hundred pounds.

Q. Fifty-eight thousand and what?

A. Eight hundred pounds.

Q. Eight hundred pounds. That is with full gas tanks?

A. Yes, sir.

Q. Was that an actual weighing slip that you received?

A. Yes, sir.

Q. Now, what kind of gears do you have in that, in the way of forward gears?

A. I have a five-speed main transmission, and two-speed auxiliary.

(Testimony of Gilbert Ripka.)

Q. Altogether, how many gears is that?

A. Ten speeds forward.

Q. Ten speeds forward? A. Yes. [207]

Q. And with a combination of each speed forward? A. Yes, sir; with a combination.

Q. Altogether, you have got something like forty different choices; is that right?

A. No; you have ten choices. First low, first high, second low, second high, third low, third high, and on up. I have nine choices on that, because with overdrive, the fifth is an overdrive gear and you do not split the overdrive gear. You have a fifth over and direct in the auxiliary only.

Q. You have close to thirty choices, haven't you?

A. No, nine choices forward. You have first low, first direct, second low, second direct, third low, third direct, fourth low, fourth direct and fifth overdrive, which is a direct gear, and auxiliary.

Q. All right. Now, on level pavement with that kind of weight, what kind of speed could you make?

A. The maximum speed—that truck would make around sixty-one miles an hour.

Q. Sixty-one miles an hour?

A. Yes, sir. That is maximum speed?

Q. Was this a diesel? A. Yes, sir.

Q. Now, when you left Santa Paula, where did you go?

A. I went to a little town by Bakersfield.

Q. Do you know the name of it? [208]

A. I believe the name was——

Q. Oilfield?

(Testimony of Gilbert Ripka.)

A. No, sir; east side of Bakersfield. Edison.

Q. Edison. All right. To get from Santa Paula to Edison you had to cross the Tehachapi range; did you not?

A. Yes, sir.

Q. You went over the Grapevine Ridge?

A. Yes, sir.

Q. And you left Santa Paula, you say, about 11:00 o'clock that morning?

A. Yes, sir.

Q. What time did you arrive at Edison?

A. I arrived at Edison about 5 in the afternoon—on; 4:30 in the afternoon, because I called to see if they were still open.

Q. And can you tell us what the mileage is from Santa Paula to Edison?

A. I believe it is one hundred thirty-eight miles.

Q. Most of it is mountainous driving, isn't it.

A. Yes, sir.

Q. You didn't take the back road, did you; you came the regular 99?

A. I came directly over 99, I believe it was State Highway 38 or something like that.

Q. Yes; all right. Using that road, you couldn't—at no [209] time did you reach your sixty-one maximum, did you?

A. I could have, but the speed law in the state of California won't permit it.

Q. All right. Anyway, when you arrived in Edison was there a place where you knew right where to go, and what to do?

A. I had to inquire where the place was, and I

(Testimony of Gilbert Ripka.)

didn't know exactly how much I was to pick up there; but I knew I was to finish out my load there.

Q. You did that? A. Yes, sir.

Q. What time did you finish that?

A. It was about 6:00 p.m.

Q. Then what did you do?

A. Went back into Bakersfield put on ice, fuel. I took on some fuel and we ate supper there.

Q. Can you remember what the temperature was? This is July 9th. A. Yes, sir.

Q. Do you remember what the temperature was there in Bakersfield, July 9th that year?

A. No; I don't. It was very hot.

Q. Bakersfield reminds you of some parts of Arizona in the summer?

A. Bakersfield reminds me of Bakersfield.

Q. Anyway, after eating there—where did you eat there, [210] by the way; do you remember?

A. I don't recall the name of the place. I have eaten in there before. It is a little restaurant on Highway, I believe, 466.

Q. A place where you could pull your equipment up in front, and kind of keep an eye on it, while you ate? A. Yes, sir. That is right.

Q. Then after eating, you started out about what time? A. About 8:00 p.m.

Q. About 8:00 o'clock. Then where did you drive? A. I drove as far as Mojave.

Q. That took you through the Tehachapi Pass; didn't it? A. Yes, sir.

Q. That was all mountainous driving, wasn't it?

(Testimony of Gilbert Ripka.)

A. Yes, sir.

Q. Do you know what that mileage was?

A. Offhand, I believe it is around one hundred miles.

Q. You climbed from an elevation at Bakersfield of some five hundred feet, up to what; do you know; getting over that pass?

A. I don't recall what the elevation is. It is not too bad; it is not too high. It is not too hard of a pull.

Q. It was hot, was it?

A. After we left; got part way up the pass, it had cooled off, considerably. [211]

Q. When you got to Mojave, was it hot at Mojave? A. No, sir.

Q. What time did you get into Mojave?

A. It was about 11:00 p.m.

Q. What did you do at 11:00 p.m., then?

A. Decided it was cool there, so I decided I would sleep there for a little while. My son laid down in the seat; he was getting tired, and I thought, "I will lay underneath the trailer on my comforter." I slept until about 7:30 the next morning.

Q. You had about eight and a half hours sleep, then? A. Yes, sir.

Q. That was an undisturbed sleep?

A. Yes, sir.

Q. And you felt rested, did you?

A. I felt very good after that hot weather.

(Testimony of Gilbert Ripka.)

Q. Well, the only time I have been in Mojave, it was hot. Didn't you find it hot?

A. No, sir. Not Mojave, it wasn't hot that night. There was a very cool wind blowing.

Q. You cross from there over to Barstow; don't you? A. Yes, sir.

Q. You are really on the desert in there; aren't you?

A. The desert doesn't start—the hot part of the desert doesn't start until you get on east of Barstow. I haven't [212] found it too hot from Mojave to Barstow.

Q. What time did you start the next morning?

A. We left Mojave about 8:00 a.m.

Q. This is the morning of July 9th, now?

A. Yes, sir.

Q. You drove from there, on to the place where this accident happened, except for a short stop at Kingman; is that correct?

A. No, sir. I stopped at Needles for about—for a coffee break. We stopped at Needles for about fifteen or twenty minutes; then went on to Kingman, checked through the port, and stopped in Kingman about 4:00 in the afternoon; and was awakened about 7:30 by a friend of mine.

Q. How much sleep do you think you got in Kingman? A. A good three hours.

Q. Do you know what the mileage is from Mojave on, over to the place where this accident happened? A. Offhand; no, sir, I don't.

(Testimony of Gilbert Ripka.)

Q. By the way, you weren't using any NoDoz tablets yourself, were you?

A. No, sir. I don't use them.

Q. Have you ever used them? A. No, sir.

Q. You don't know what they are?

A. I take it back. I had used them years ago. I know they [213] leave you very nervous and upset. That is the reason I don't use them.

Q. NoDoz?

A. NoDoz, no sleep; anything like that.

Q. Do you know how long they have been on the market?

A. They have been on the market several years.

Q. They are just caffeine, aren't they?

A. I believe so; I am not sure.

Q. Like a cup of coffee. Does coffee leave you nervous, upset? A. No, sir.

Q. You drink coffee when you drive?

A. Yes.

Q. It is one of the best things you could drink, when you drive? A. To a certain extent; yes.

Q. All right. Did you have any coffee after you left Kingman? A. No, sir.

Q. Did you have any at Kingman?

A. Yes, sir.

Q. And how much?

A. I don't recall. It would have been two, possibly three cups.

Q. I have never driven a truck like that; but I have driven [214] an automobile. A trip like that,

(Testimony of Gilbert Ripka.)

driving a truck like that, is more difficult than driving an automobile?

A. To me it isn't. I would rather drive a truck than I would an automobile.

Q. In a truck, you are pretty safe, aren't you? You are up above most of the traffic?

A. I believe our seats are more comfortable, more support.

Q. In a truck, where your feet hit the floorboard is about the top of the average automobile, isn't it?

A. No, sir.

Q. You look way over the tops of ordinary automobiles? A. Yes, sir.

Q. And I might ask you; do you know what this little Hudson would weigh, that you came into collision with?

A. Possibly, about thirty-eight—about thirty-eight hundred. Thirty-eight hundred to four thousand pounds. I don't think it would run over thirty-eight hundred.

Q. When fifty-eight thousand pounds hits thirty-seven hundred pounds, the thirty-seven hundred pounds stops right now?

Mr. Wilmer: If it please the Court, we object to that as argumentative.

Mr. Palmquist: I will withdraw the question to avoid the interruption.

Q. (By Mr. Palmquist): How did you feel as you were coming [215] along there from Kingman, or driving this big diesel equipment; did you feel good? A. Yes, sir; I felt very good that day.

(Testimony of Gilbert Ripka.)

Q. You were relaxed, were you?

A. Yes, sir.

Q. And those Diesels get so they purr, don't they?

A. To a certain extent, yes.

Q. And you weren't sleepy at all?

A. No, sir.

Q. Not at all. You were wide awake?

A. Yes, sir.

Q. This was about 3:00 o'clock in the morning now?

A. Yes, sir.

Q. Now, we come to the part that concerns us here; this curve where this accident happened. You recall that?

A. Yes, sir.

Q. You remember coming into the curve?

A. Yes, sir.

Q. And you remember before you got to that curve you had been on a straight stretch there for some little bit?

A. Some upgrade. Just a ways before the curve I had to gear down; and possibly half or three-quarters of a mile before the curve, I was in a lower gear. And after topping the grade, I went back into my direct gear. I wasn't running in overdrive that night on account of waiting on this friend [216] of mine.

Q. You were able to pick up a little more speed when you were on this straight stretch?

A. Yes, sir. I was running between forty and forty-five, after gaining my speed back again off of the grade.

Q. You would have been going faster, except

(Testimony of Gilbert Ripka.)

there was a Mr. Solomon, a friend of yours, that you had lent a tire to? A. Yes, sir.

Q. He had had some tire trouble?

A. Yes, sir.

Q. You were kind of expecting him to catch up to you?

A. I was more or less waiting for him because he had a larger rig and heavier load.

Q. There was nothing about the weather that caused this accident, was there? A. No, sir.

Q. You could see well?

A. Vision was very good that night.

Q. Clear? A. Clear; yes, sir.

Q. There weren't any thunderstorms that put down a blinding rain like we had at noon today, that would obstruct your vision? A. No, sir.

Q. No fog? A. No, sir. [217]

Q. And obviously no water or ice on the pavement; nothing like that?

A. No, sir. I also made the remark that the bugs were very few that night.

Q. Even few bugs? A. Yes, sir.

Q. So as you rolled along there, you came to the point where you saw this curve to the right?

A. Yes, sir.

Q. You never did make that curve, did you?

A. No, sir.

Q. As a matter of fact, if you drew a straight line down the highway you had been going on, to where your truck finally came to rest it would be straight, wouldn't it, out of that lane?

(Testimony of Gilbert Ripka.)

A. I believe so. I had started to enter the curve and dropped off on the bituminous before getting to the curve.

Q. Now, let's see; this trailer of yours was a little over eight feet wide, wasn't it?

A. Yes, sir.

Q. There is twenty-two feet of pavement, so that you had eleven feet as your half of the road?

A. Yes, sir.

Q. And that meant that if you kept your duals on the pavement on the right side, that left edge of your trailer is [218] riding pretty close to that center line, isn't it?

A. Would you restate the question, please?

Q. If you had your right duals on all pavement, that would put the left side of the refrigerator box of your equipment pretty close to the center line, within a foot, wouldn't it?

A. Depends on whether you are riding the edge of the concrete or riding the center line. If you are riding the center of the lane, you would be about a foot and a half from the center line.

Q. Anyway, because of this curve, and because you saw somebody coming, and because of the width of your equipment, you got over as far to the right as you could?

A. Yes, sir. Also there is a sign there that says, "Slow vehicles keep to right."

Q. Do you read those signs as you go down the highway at 3:00 o'clock in the morning?

A. I notice them, yes, sir.

(Testimony of Gilbert Ripka.)

Q. Are you sure you noticed it that night or do you think someone called that to your attention later, when they were talking about this case?

A. No, sir. No one called it to my attention.

Q. 3:00 o'clock in the morning, July 10th, you saw that sign that said what?

A. "Slow vehicles keep right."

Q. Maybe that is why this accident happened, because you [219] were looking at the sign instead of the traffic, could that be?

A. No, sir. I don't have to look at a sign on the highway, you train yourself to have split vision to read signs and still keep your position on the highway.

Q. You had never been over this road before, had you; this was a new experience to you?

A. Yes, sir.

Q. And this sign you are talking about—I don't know with my glasses if I can read this or not; I am referring to Plaintiff's number 23. It is right there at the start of the curve, isn't it. Is that correct?

A. Yes, sir.

Q. Let me see if I have a pen. I will put an ink arrow pointing to that sign. That is at least eight, nine, maybe ten feet off the edge of the pavement, isn't it?

A. Yes, sir.

Q. And you are going uphill there, aren't you?

A. No, that is more or less flat, right there.

Q. Aren't you going up a grade—but you were getting ready to go into a grade?

(Testimony of Gilbert Ripka.)

A. The grade starts over here.

Q. You weren't giving it a little extra power to get up a little more momentum for that grade, were you?

A. No. I was running about forty-five.

Q. So you saw that sign, didn't you? [220]

A. Yes, sir.

Q. So, one thing we can be certain of, is when this accident happened it happened some place past that sign, didn't it?

A. Yes, sir.

Q. And that sign is marked on Plaintiff's Exhibit number three here by somebody down here—I will draw a circle around it. I will call this "R-1." You say that sign says, "Slow vehicles keep right"?

A. Yes. Either, "Slow vehicles," or, "Slow traffic keep right."

Q. I have asked you this before; but I want to make certain of this. And you are certain you did see that sign?

A. Yes, sir.

Q. You are certain you read it, and understood it?

A. Yes, sir.

Q. Paid attention to it?

A. Yes, sir. Because I was looking for a four-lane highway going up the grade and pulling off to the right. That is the usual procedure, when you see a sign of that type; as a rule, there is a four-lane highway or truck lane to the right of the regular lane.

Q. All right. Now, it is about 3:00 o'clock in the morning when this happened, when you saw this sign?

A. Yes, sir. [221]

Q. Was your boy wide awake with you, then?

(Testimony of Gilbert Ripka.)

A. He is sleeping.

Q. He is sleeping? A. Yes, sir.

Q. Do you fellows have any radios in those cabs?

A. Yes, sir.

Q. Do you have one? A. Yes, sir.

Q. Did you have it going?

A. At that time, I don't believe I did because I had my little blower motor going, and the firing of it affects the radio.

Q. Something like trying to listen to a radio in an airplane?

A. My son used to call it a machine gun.

Q. Anyway, at that time you are off the—I have got counsel making a truck for me here, as soon as I get this truck—the whole thing is ninety-four feet five inches, ninety-four inches wide. Now, when you passed that sign, if I understand you correctly, you had pulled to the right and were way down here?

A. I had pulled off before, pulled on the bituminous before getting to the sign.

Q. As you came along here, you were way off on this (indicating)? [222] A. Yes.

Q. When you say “way off” what was the furthestest you got over there?

A. I didn't say way off. I said I was off of the concrete on the bituminous.

Q. I was going by your deposition. You were about five feet off, were you?

A. No, sir. I was about five feet from the center line.

Q. The left side of your trailer would be five feet

(Testimony of Gilbert Ripka.)

from the center line? A. Yes, sir.

Q. I measured down there, this red, dotted line, five feet. At no time was the left side of your trailer past that? A. After I pulled off; no.

Q. Well, at no time did you ever go to your left from that time on, even until after the accident happened, is that correct—I mean before the accident happened?

A. Before the accident happened. No, sir; I didn't go to my left.

Q. So that we know up here to "R-1" the accident hadn't yet happened. So that you were still, up to "R-1," with at least five feet between the center line and you; right? A. Yes, sir.

Q. This is a little short, I am told—do you have one of those magnet things? [223]

Mr. Scoville: Yes.

Q. (By Mr. Palmquist): This is just a little short; but if we laid your tractor, that according to this, just about puts you off onto the—as you came along here, puts you off on the black surface; is that right?

A. Put the right duals on the bituminous.

Q. Now, I should think when that happened there would be no doubt in your mind about it. You can sit in your cab, can't you, and as you listen to the sounds—you sort of drive those things by the sounds they make?

A. By the sound and by the feel of them, yes, sir.

Q. There is no doubt in your mind about that

(Testimony of Gilbert Ripka.)

because you knew what kind of a sound—I am just going to draw your truck in here at “R-1.” Mr. Scoville, will you come and give me some support?

This would be your tractor, coming along there. And the dual wheels would be on this, wouldn’t they?

A. That is right.

Q. And the dual wheels of the trailer would be in here, wouldn’t they? A. Yes, sir.

Q. And your speed at that time was how fast?

A. Between forty and forty-five miles an hour.

Q. Forty to forty-five miles per hour. Now, at that time, when you were here, were you aware of the Sanders’ automobile? [224] A. Yes, sir.

Q. Where was the Sanders’ automobile, at that time?

A. At that point it was about where the trailer is now, or on to the east a little further.

Q. Could you step down here. This is not quite to scale, but almost: Would you hold it where you saw it. Do you understand the map? I want to be absolutely fair with you. This is westbound in here, from here to here. I will draw a line in that shows the center line. That should be put in a different color. That is the center line. The edge of the pavement is here. Do you see where the engineer shows the edge of the pavement. Of course you are over here. This is eastbound, do you see; this is westbound. Have you got that? A. Yes.

Q. Then this is the edge of the bituminous surface. Where you were pointing, you were pointing

(Testimony of Gilbert Ripka.)

to the Sanders' car being way off the pavement. I am sure you didn't mean that, did you?

A. No, sir.

Q. Do you understand the map now, do you think? A. What scale is the map?

Q. It is one inch equals three feet. Now, we have a scale here. One foot there, two feet, four feet. Could you tell us this; how far was the Sanders' car from you at that time? A. At this point here?

Q. Yes. [225]

A. Approximately right in about here. I wouldn't say that is an exact answer. This map doesn't, for the scale, show the curve.

Q. You lose the curve in this enlargement. When you see it there it looks right, doesn't it?

A. Yes, sir.

Q. Just go over and place that little car where you think it was. I will try to help you. How far do you think it was in front of you; one hundred fifty or two hundred, half a mile? How far ahead would it be from you? That would be thirty-six, that would be seventy feet, make it one hundred over here. We indicated over there it would be about one hundred. Is that about right?

A. The car would be about in here (indicating).

Q. A little over one hundred feet then you think; one hundred feet of highway, separating you and the car? A. Yes, sir; in this area.

Q. Will you hold it about where you think you saw it there; and I will draw around it. It was on its side of the highway, was it?

(Testimony of Gilbert Ripka.)

A. At one hundred feet, I would say yes, it was.

Q. I will draw it in there. And it, of course, was eastbound, wasn't it? A. Yes.

Mr. Wilmer: Westbound. [226]

Q. (By Mr. Palmquist): Westbound, pardon me. It was, I understand, pulling a luggage trailer of some kind? A. Yes, sir.

Q. Was it, at that time, on its side of the road?

A. Yes, it was, as far as I remember it was, yes.

Q. Let's call your truck, here at "R-1," "R-1A," meaning that is where you read this sign, "Slow vehicles keep right."

A. I read the sign down here. I wasn't at the sign at the time I read it.

Q. You measure back here. That would be about seventy some feet?

A. I wouldn't give a definition exactly how many feet it was, because you are trained to use a split vision.

Q. I understand.

A. Therefore, I can look at the Judge and see you also.

Q. That is right. You don't have tunnel vision, you mean? A. That is right.

Q. But when you are looking at me now, you can't see the Judge? A. No, sir.

Q. This circle called, "R-2," being the Sanders' car. You had seen this car coming—will you be sure to keep your voice up—when you saw the Sanders' car at "R-2," you had seen him coming around some curves, hadn't you?

(Testimony of Gilbert Ripka.)

A. I had seen him as he started down the grade, or he was [227] partly down the grade.

Q. Yes. Let's go back to this map. This map is Plaintiff's Exhibit 1. That big map you see is the space between these two areas, do you see that?

A. Yes, sir.

Q. This sign we are talking about is in here and you are in here. You see the Sanders' car, you had seen the Sanders' car coming along, making this curve, hadn't you?

A. I had seen him, when he started down the grade.

Q. Will you take your seat, please. As a matter of fact, you had seen him for at least a half a mile, hadn't you?

A. I would say more or less three-quarters of a mile.

Q. Three-quarters of a mile. He had been coming downhill and had to make turns, isn't that correct? You had seen him coming from way back over there?

A. About this point.

Q. Let's put an ink arrow there. Will you step here and use this as a tape, if you will; just take that and make the arrow, where you first saw him coming.

A. The scale of this map gets smaller, shows the highway smaller. It possibly would be in this area here.

Q. All right.

A. That wouldn't be exact, because the scale of

(Testimony of Gilbert Ripka.)

this map gets smaller the way the photograph is taken.

Q. I will put an arrow down to that end, and we will call this [228] "R-1," meaning that is the mark you made there. That is Plaintiff's Exhibit number 2. You at that time would be some place in here? A. Back down this way further.

Q. You would be back off this way?

A. Yes, sir.

Q. Not even into the picture yet?

A. No, sir; I don't believe so.

Q. But you had a straight stretch and level, didn't you, up to where the accident happened, correct? A. Yes, sir.

Q. From this point we are talking about now. And the man coming in the opposite direction was coming around some curves and coming downhill, wasn't he?

A. Yes, sir. I presume there were curves in that section of the highway.

Q. Will you be seated, please. You understand, of course, that one of the problems involved here, is whether or not Mr. Sanders' was asleep, isn't that correct? A. Yes, sir.

Q. And you understand Mr. Sanders is unable to be here to tell us whether he was or not?

A. Yes, sir.

Q. You wouldn't expect a man asleep, to have gone around those curves you saw that car come around? [229]

Mr. Wilmer: If it please the Court, that is

(Testimony of Gilbert Ripka.)

not proper cross-examination, what he would expect or would not expect. It is invading the province of the jury.

Mr. Palmquist: I withdraw the question.

The Court: Let's proceed, counsel.

Q. (By Mr. Palmquist): You kept watching this car right up until you got to this point?

A. I didn't keep watching it directly, no. I kept it in my vision. That is not a habit of watching one vehicle. Keep it in your vision, but you don't look directly at it. That is a very poor way of driving.

Q. You were in a position so that if that car had been exceeding the speed limit or driving recklessly or fast you would have been able to see that?

A. Yes, sir.

Q. Would you tell us what judgment, if any, you formed as to the speed of that car when you saw it coming around that curve and at that distance shown by the picture the jury has been looking at?

A. I judge the speed of the other vehicle about the same as mine, about forty or forty-five miles an hour.

Q. About the same as yours? A. Yes, sir.

Q. It was on its own side of the road, was it?

A. It seemed it be, up to a few feet before the accident. [230]

Q. Its lights were burning, is that correct?

A. Yes, sir.

Q. Did you notice whether that car weaved back and forth from side to side on the road?

A. I don't believe it did.

(Testimony of Gilbert Ripka.)

Q. That isn't a matter of belief, it is a matter of fact. If you don't know, please say so. Did it or didn't it? A. No, sir, it didn't.

Q. That car came as straight as an arrow, didn't it? A. Yes, sir, as far as I know it did.

Q. It stayed on its side of the road, didn't it?

A. It did up to the few feet before the impact.

Q. I understand. And it didn't vary its speed, it didn't slow or increase its speed, did it?

A. That I don't know.

Q. As far as you were concerned it had split the distance in about half to the midway point from where you were when you first observed it until where you met it, it traveled about the same distance you had?

A. It traveled about the same distance.

Q. That is one of the things you observed that made you observe it was going about your speed, isn't that right? A. Yes, sir; that is right.

Q. When you looked at this car and saw it coming you were kind of looking off to the right. The road was straight ahead [231] of you and this car was off over here, coming around these curves and it crossed in front of you and made this curve, didn't it?

Mr. Wilmer: If it please the Court, unless counsel specifies what curves he is talking about I object to the form of the question.

The Court: He may answer. There is a gesture in there.

Mr. Palmquist: A gesture from my right, your Honor, across the front of me to my left.

(Testimony of Gilbert Ripka.)

A. Using split vision I didn't have to look to the right.

Q. (By Mr. Palmquist): What do you mean by this split vision?

A. You use a split vision in the Army, which I was trained for. I can see the man on the right of me and I can see the man on the left of me. By looking split vision I can look ahead and still spot something off to my right or off to my left.

Q. Well, we all have panoramic vision, I believe. I can see this man over here; I can see Mr. Scoville. I am concentrating on you, yet I can see his Honor, the court reporter. We all have panoramic vision, is that what you mean?

A. We do to a certain extent. Some of it is exercised more than others. In other words, some of us are trained to use our split vision more than others. [232]

Q. What you mean, you weren't looking down a telescope down the middle of the highway?

A. That is right.

Q. What I am trying to get at, if I was there in your position driving this truck that night, when I first saw Mr. Sanders' car, when I looked at it directly I would have to turn my head like that. It would have been over here, wouldn't it?

A. The average person would have.

Q. You didn't have to do that because you were trained in the Army and so forth with this split vision?

A. Yes, sir.

(Testimony of Gilbert Ripka.)

Q. You made these observations with this split vision? A. Yes, sir.

Q. Were there any vehicles traveling behind the Sanders' car? A. No, sir.

Q. Were there any vehicles traveling behind you? A. I don't believe there was at that time.

Q. Will you tell me in your own words how this accident occurred?

A. I got almost to start into the curve and it seemed like this automobile just drove over in front of me. About seventy-five feet from me it seemed like it crossed over all at once. [233]

Q. He dove. You use that word advisedly, "dove," is that correct?

A. What do you mean by "advisedly"?

Q. Well, you said "dove." When you said "dove" I am thinking of someone diving into a swimming pool or jumping. You say the car dove in front of you? A. You use the word dart then.

Q. Well, like a child ran between—you are here and he is back up here. Now, where in between this spot "R-2" and "R-1A" that this dove took place, this dive? Would you come down here?

A. I couldn't give the exact spot.

Q. I realize you weren't out there with a stop watch or steel tape. A. That is right.

Q. You weren't expecting an accident to happen, were you? A. No, sir.

Q. But you must have some basic idea, don't you?

A. All I remember, it seemed like the car came

(Testimony of Gilbert Ripka.)

up in a position like this and just shot over like this.

Q. Just take this—this makes a nice mark we can all see. We realize you didn't measure it but just approximately. We have got you established here and we have got Sanders established there. If you can't do it say so.

A. I don't believe I can do it. At a time like that it is [234] very hard to. If I did it would simply be by figuring by the map and it wouldn't be an exactly true answer.

Q. We are not going to hold you to an exactly true answer. Let me ask you this. Did he dive back here at "R-2"?

A. No, he was up in here further.

Q. Then you do have some idea approximately where it happened, don't you?

A. Approximately right in here is where it dove in. That is not exact because the map——

Q. You were indicating a maximum and a minimum. Can you give me the maximum and minimum where this dive took place?

A. The minimum would be about here; the maximum would be about here (indicating).

Q. The thing I want you to do for me, show me the position of your truck at the end of this dive, where he struck you. Were you still five feet from the center line?

A. As far as I know, yes. I followed the bituminous and I stayed on the bituminous with my right duals. You can feel when you get on the concrete.

Q. You hadn't done any diving toward him?

(Testimony of Gilbert Ripka.)

A. No, sir.

Q. You stayed right where you were moving along here? A. Yes, sir.

Q. Keeping in mind this is the front of your truck, put your truck in the position it was at the instant he completed [235] this dive into you, as he struck you. You just hold it there so we can see the position.

A. I am afraid I couldn't at that moment. It is pretty hard to fix that.

Q. Let's take the moment before he struck you, the moment before he started this dive, can you do that? A. I don't believe I can do that either.

Q. Where did the accident take place?

A. It took place right in here.

Q. All right, will you take and draw a big circle where you saw it take place?

A. I think it took place here, I am not sure, because at a time like that that is something that won't register. And I was slightly unconscious at the time.

Q. You were slightly unconscious at the time?

A. After the impact.

Q. You weren't slightly unconscious just before the impact? A. No, sir.

The Court: At this time, Gentlemen, we will recess for ten minutes.

(Recess.)

Q. (By Mr. Palmquist): Mr. Ripka, would you step down here now. Just before the recess you had taken and drawn a circle where the accident happened the best of your ability, [236] and I am going

(Testimony of Gilbert Ripka.)

to follow over with a black dotted line the red line you made. I want you to watch me. This is correct, isn't it?

A. That is the line I made, yes, sir.

Q. Is that correct?

A. That is the line I made.

Q. We have "R-1," "R-1A" and "R-2." We will label that "R-3."

Will you take your seat again, please. Mr. Ripka, I had asked you to tell us in your own words when you were at "R-1A," and Mr. Sanders was at "R-2," and you said when the car was about seventy-five feet, I believe, is that what you said?

A. Yes, sir.

Q. Your attorney, Mr. Wilmer, suggested in opening statement that it was fifty feet. Was it fifty feet or seventy-five feet?

A. About seventy-five feet.

Q. About seventy-five. Do you know how long this courtroom it?

A. This courtroom is approximately fifty feet.

Q. So it was about half again the length of this courtroom between you, the front of Mr. Sanders' car and the front of you, when he made this dive, as you call it?

A. The courtroom is more than fifty feet. [237]

Mr. Palmquist: Could I ask the Court, does anyone know what the size of the courtroom is?

The Court: I don't have any idea.

Mr. Wilmer: If counsel likes I will step it off.

Mr. Palmquist: I would appreciate that.

(Testimony of Gilbert Ripka.)

(Counsel steps off distance in courtroom.)

Mr. Wilmer: Nineteen.

Mr. Palmquist: About sixty feet.

Mr. Wilmer: Yes, I would say that.

Q. (By Mr. Palmquist): So it was a little more space from that wall to this wall between you and the other car when it made this dive?

A. Yes, sir.

Q. Can you think of any other words besides this word dive—dove, I guess you said?

A. Dart, dove.

Q. Dart or darted. You mean there is something uncertain in your mind about this that makes you quite unsure how to describe what happened?

A. No, sir, nothing uncertain in my mind.

Q. What you are sure of is that your vehicle came into collision with the other vehicle, right?

A. Yes, sir.

Q. No question about that?

A. No, sir; no question about that. [238]

Q. No question in your mind it was the left front corner of your bumper that was first involved?

A. That I wouldn't say, it was the left front bumper, the edge of the bumper or in front of the left front wheel.

Q. But at least in one of those pictures it showed your left front bumper bent right back, it took quite a force, didn't it?

A. Not too much at that point.

Q. And "R-3," so we can understand it, is what you drew to the best of your ability where the ac-

(Testimony of Gilbert Ripka.)

cident happened, is that correct? A. Yes, sir.

Q. You couldn't make it any more specific than that? A. No, sir.

Q. Did you hang around out there and help pick up some stuff out there? A. No, sir.

Q. But just for the purposes of illustration now and nothing else, you had not yet gotten into the curve, is that right?

A. Just starting into the curve slightly.

Q. The other car was over here some place and you were back down here like this, right, with your duals off—if this is the edge of the pavement—off on the black top, right? [239] A. Yes, sir.

Q. And about five feet you figure between the center line, right? A. Yes, sir.

Q. So apparently when this car dove, as you call it, you mean turned? A. Turned.

Q. Turned. Now, if you had gone straight ahead you would have gone off the highway?

A. Evidently, yes.

Q. And it was necessary for you to swing to the right, wasn't it? A. Yes, sir.

Q. If this car had gone straight ahead it would have gone off the highway over here, wouldn't it? Both vehicles had to do something with their wheels, isn't that correct? A. Yes, sir.

Q. And so assuming this to be about seventy-five feet, when this car turned was it a gradual turn such as that, or was it a sharper turn?

A. It was a sharper turn.

Q. Would you come up here and kind of indicate,

(Testimony of Gilbert Ripka.)

just for the purpose of illustration, so we can follow you, how sharp that turn was?

A. I can't indicate on this map because it has too much [240] of a curve there.

Q. All right. Let's erase this and make the curve less then, for the purposes of illustration. Draw the center line first. Let's say the top of the black-board is toward Flagstaff. Put your truck down here or wherever it was. Now, show us the path of travel that car took.

A. This couldn't be exact; as close as I could remember it came on down and come over like that (indicating).

Q. About like that. What part of the car would that be?

A. That would be the front part.

Q. Would you just draw the car in in the position it occupied at that time?

A. Probably would have been in a position more like that.

Q. What would be the position of your truck at that time?

A. It would have been in a position like that (indicating).

Q. Now, let's erase carefully this car back here and put the trailer in. The trailer would be following that, wouldn't it.

Now, the forces that would occur would be first from your truck a force continuing from Flagstaff, right?

A. Yes, sir.

Q. Then that would be met by a force such as you have described, coming at an angle but in the

(Testimony of Gilbert Ripka.)

opposite direction, correct? A. Yes, sir. [241]

Q. Which would be followed by a drag, the trailer, something like that, right? A. Yes, sir.

Q. Which when this collision occurred would reverse this arrow, would it not, so that then became a force instead of a drag, correct? Because there would be a stopping here which would then make the weight so there would be a pushing effect. You experience that all the time when you drive these semis?

A. Not this type pushing effect, because your leverage is behind your wheels. Here is the wheels of the automobile; the leverage and your tension to turn is behind the wheels which gives it a different leverage.

Q. A car making a sharp curve like that would have a tendency to whip that trailer, wouldn't it? In fact, I went to the dime store today and bought myself a trailer and car. In other words, as long as this came along like this, as long as there is a pulling, that trailer will track, won't it?

A. Yes, supposed to.

Q. But the big difference between this kind of a trailer and a kind of a trailer that you had was that in your trailer you had air brakes, didn't you?

A. Yes, sir.

Q. And this could very well represent, could it not, your equipment, right? Is that correct?

A. To a certain extent, yes. [242]

Q. Yes. Now, if you have drawn on the board

(Testimony of Gilbert Ripka.)

when this car suddenly cut across, could that be about it like that? A. Yes, sir.

Q. What? A. I believe it would be, about.

Q. About like that. Now, when that happened your truck would have a tendency to stop this force here, wouldn't it?

A. If it was a direct force it would.

Q. Make it glance off?

A. If it was a direct force it would; if it was a glancing force it wouldn't.

Q. If that car turned like this would that trailer whip around like this (indicating)?

A. I believe it would.

Q. That is exactly what happened in this accident, isn't it?

A. That I couldn't say, I don't know.

Q. As a matter of fact, first it was this, it was this business, wasn't it, front to front like that? You think it was more like that (indicating)?

A. Yes.

Q. And when that happened that took off the left front fender here, didn't it?

A. I believe it did. I haven't seen—I wasn't able to tell too much of what happened out there after the accident occurred. [243]

Q. The front duals ran over that fender, didn't it? A. That I don't know.

Q. Or still tearing away at it. And the left duals of the drivers ran over it?

A. that I don't know.

Q. It was sliding along underneath here, wasn't

(Testimony of Gilbert Ripka.)

it until where you got that undercarriage that holds the tire? A. That I don't know.

Q. That was where it picked up that fender, didn't it? A. That I don't know.

Q. Didn't you see that fender under there? I show you here—I am referring to Plaintiff's Exhibit 25. You see that fender under there? We have been told by other witnesses that that was the left front fender of this car.

A. I don't know whether it was or not.

Q. But you do have this undercarriage under that refrigerating equipment where you carried your spare tires? A. Yes, sir.

Q. And that is the lowest part under the trailer, isn't it?

A. The tire carriers are above the axle, above the center line of the axle.

Q. These?

A. Yes, sir. These tire carriers are about that high off the ground (indicating).

Q. Are there air lines back in here? [244]

A. Up in the framework?

Q. Up in the framework, yes.

A. Yes, sir.

Q. As this fender came along there was an air line broken in the trailer, wasn't there?

A. No, sir.

Q. There wasn't? A. No, sir.

Q. Was there one broken on the tractor?

A. There was one broken in the tractor, I believe off the compressor line.

(Testimony of Gilbert Ripka.)

Q. Up here? A. Yes, sir.

Q. Are these the same kind of air brakes they stop trains with, same kind of air brakes?

A. I don't believe the trains use the air emergency valve. By that I mean when the air is released or left off suddenly the trailer brakes set up and we use the air emergency valve on the trailer.

Q. That is what I am getting to. When this air line broke up here that set up the trailer brakes, didn't it? A. Yes.

Q. And they set like that (indicating) right now, don't they?

A. No, it wouldn't be that quick. [245]

Q. How quick?

A. It takes a few seconds for the air to drain into the pancakes or boosters, which takes quite a quantity of air.

Q. Would that make those duals slide?

A. No, it wouldn't on that trailer, not under thirty-two thousand pounds. If the back axle was loaded with thirty-two thousand pounds it would not slide on the type of highway that this was and the type tires that was on that.

Q. So you wouldn't get a sliding effect so much but you would get a pressure mark, wouldn't you?

A. More or less, yes.

Q. It wouldn't be like a black skid but it would be more like a movement being pushed forward and the wheels didn't go quite fast enough to keep up and you would get a rubber mark, right?

A. On some types of tire you might get a rubber

(Testimony of Gilbert Ripka.)

mark. On those there I don't believe you would get too much of a rubber mark.

Q. We have been told this is your trailer as it stopped there at the scene of this accident that night. Do you recognize it as your trailer?

A. Yes, sir.

Q. Are these the type tires you had there and the undercarriage for spare tires?

A. This is the undercarriage; this is the tires, yes. [246]

Q. Now, do you see leading back onto the highway there some marks leading right up to the rear wheels there?

A. Yes, sir, I see several marks.

Q. But do you see right there a mark that is obviously a dual wheel mark, right where I am pointing?

A. Yes, I see a mark there. I wouldn't say whether it was the dual wheels off of this trailer.

Q. It leads right up to this trailer, doesn't it?

A. I believe you can see it leads up to this point.

Q. We have some other pictures here. What is this I am pointing at here?

Mr. Wilmer: I wonder if counsel, for the purpose of the record, would be kind enough to let us know what he is referring to, because we can't see what he is referring.

Mr. Palmquist: Yes.

Mr. Wilmer: I am speaking, for the record, if you will indicate what you are referring to.

(Testimony of Gilbert Ripka.)

Mr. Palmquist: It appears to be, looks to me like dual wheels.

A. Those are mud flaps required by the Interstate Commerce Commission.

Q. Those are mud flaps, those are not wheels?

A. No, sir.

Q. All right. In other words, those aren't the edge of the two wheels there? [247]

A. No, sir.

Q. Those are mud guards? A. Yes, sir.

Q. Would you be seated, please. Now, would you step down again just a moment, and looking at Plaintiff's Exhibit 19, this is the picture with the patrol car at the read end. Now, do you see these two marks going along there as though they were made by duals, right where I am indicating? Let me put a little arrow there on Plaintiff's 19. You see then down here, and you see a wide tread, here is the edge of the wide tread right there and the edge of a wide one there. Will you look at those carefully. And then for the record, while the witness is looking at that Plaintiff's Exhibit number 25, I will put some arrows pointing to what we were just discussing regarding that picture. You see that?

A. Yes.

Q. Now, are those the kind of marks a dual wheel would make?

A. Yes, but that doesn't necessarily mean those marks were made by this trailer.

Q. I didn't ask you that, I asked you if those were the kind of marks a dual wheel would make?

(Testimony of Gilbert Ripka.)

A. Yes.

Q. All right. Would you be seated, please.
Might I have this identified? [248]

(Plaintiff's Exhibit number 37 marked for identification.)

Q. I have here a picture in evidence which is an enlargement of the one the jury is now looking at. This is Plaintiff's Exhibit 19-A in evidence. I will make with this pencil again the arrow indicating the marks there and there; and here is the edge of the marks there. Here is one edge there coming down. You see those marks? A. Yes, sir.

Q. Now, I will label these arrows "R-1's." Now, we see some other marks in this picture. It looks like something went like this, doesn't it?

A. Yes, sir.

Q. It starts back here; it is here, is it not, and it is here. It is over here, is it not; and they end right here, do they not (indicating)? Do you see them?

Mr. Wilmer: I don't like to object, your Honor, but what in the world is the record going to look like?

Mr. Palmquist: I am going to put marks——

Mr. Wilmer: I have no notion of what he is putting marks on, anything about it. If he can show as he is proceeding what he is doing.

The Court: Perhaps counsel should come up here——

Mr. Palmquist: And look over my shoulder, yes. We will call these arrows "R-2's," to distin-

(Testimony of Gilbert Ripka.)

guish them from the other arrows. Now, those marks are a different type of marks, [249] these "R-2" marks than the "R-1" marks, is that correct?

Mr. Wilmer: Just a moment. If it please the Court, the exhibit is here, it is here for the jury's interpretation. What Mr. Ripka may interpret is completely immaterial. It is what the gentlemen determine it is. And to call upon him to interpret the picture is going beyond the realm of cross-examination and attempting to invade the province of the jury and interpret the picture for them.

The Court: The objection will be sustained.

Mr. Palmquist: All right, I will pass this picture to the jury at this time.

Q. (By Mr. Palmquist): Mr. Ripka, while the jury is looking at that picture I would like to ask you a question. Have you ever driven a two-wheel luggage trailer towed behind a car?

A. I have never driven one, I have rode in one.

Q. All right. You know something about how they tend to work, do you? A. Yes, sir.

Q. And assuming that a driver should suddenly frantically try to stop a car, braking, will they whip from side to side?

Mr. Wilmer: Just a moment. If it please the Court, I haven't objected to counsel attempting to carry out experiments here in the presence of the jury without it being shown the condition is the same, the type load is the same, the trailer hitch is the same, all the other conditions are the [250] same. What would happen under conditions of one

(Testimony of Gilbert Ripka.)

vehicle I think we all know would be different under conditions dissimilar and different vehicles.

Mr. Palmquist: I am not trying to carry out an experiment, just for illustrative purposes.

The Court: What kind of a luggage trailer, what kind of car, what kind of hitch?

Mr. Palmquist: The thing I wish to point out will apply to every two-wheel luggage trailer being towed behind a car without brakes.

Mr. Wilmer: If it please the Court—

The Court: You may ask him that question.

Q. (By Mr. Palmquist): All I wanted to ask you is this: If a trailer was whipping from side to side like this would it make marks that would come together such as we see in this picture?

Mr. Wilmer: I don't know how the witness can possibly answer the question. He said a trailer whipping from side to side. There is no description of how it is whipping.

The Court: If the witness can answer; if he doesn't know he can say so.

A. I don't believe I would know under the conditions.

Q. (By Mr. Palmquist): Mr. Ripka, let's assume, not that you did, but let's assume you had fallen asleep and failed to make the curve and such a driver in the position of Mr. [251] Sanders that night had been trying to stop when he saw you coming across that center line, while pulling to his right, and let's assume instead of the way you explained it with the trailer whipping behind and you

(Testimony of Gilbert Ripka.)

came across the center line and caught him like this, that would push this car sideways, would it not?

A. No, sir.

Mr. Wilmer: Just a moment. That is invading the province of the jury, if it please the Court. This man is not qualified as an expert in crashes, in the action of vehicles in an accident. Let these gentlemen decide what happened.

The Court: He may answer if he knows.

A. An automobile pulling to the right and broke, was braking at the same time, his action would be like this (indicating). It would not be like this. His action would be like this for the simple reason his leverage is behind his wheels. And in that manner it would have been caught more like this.

Q. All right. Now, Mr. Ripka, if he had come across like this when the collision occurred wouldn't you expect then to find the personal effects out of this trailer over here?

A. No, not necessarily.

Q. On the south of the center line?

A. No, sir. [252]

Q. You wouldn't have expected to have found them north and in the ditch, like a camera in the ditch and off the road, would you?

A. Yes, it could have been.

Q. With the tarp on the trailer having—a board off the trailer having impaled in the car and the tarp off that trailer coming in here like that? You would have expected to find most of that personal effects, if it happened south of the white line, you

(Testimony of Gilbert Ripka.)

would have found the contents of that trailer down in here instead of up in here, wouldn't you?

A. No, sir.

Q. You may be seated. Mr. Ripka, didn't you look at the skid marks out there on the pavement that night?

A. No, sir. I was slightly unconscious at the time and I don't recall too much after the accident.

Q. You remember talking to Sergeant Harris and his wife when they came along from the Navajo Ordnance Depot, that is the Army man and his wife who was the nurse?

A. No, sir, I don't recall talking to them. I don't recall too much that went on. I don't recall talking to them.

Q. Didn't you go out there during the daylight hours to see what marks were left on the road?

A. No, sir.

Q. You never went back at all?

A. I have never been back to the scene of the accident [253] except last Tuesday, the 3rd.

Q. How long were you in Flagstaff after the accident?

A. I believe until Friday evening, the following Friday evening.

Q. Is that a week? A. Be almost a week.

Q. And you never bothered to go back to look at any of the skid marks until last Tuesday?

A. I had no transportation.

Q. Who went with you last Tuesday?

A. Be—counsel.

(Testimony of Gilbert Ripka.)

Q. Mr. Wilmer here? A. Yes, sir.

Q. Up at Flagstaff? A. Yes, sir.

Q. And Mr. Wilmer wasn't in this accident that night, was he, he wasn't with you I mean.

Mr. Wilmer: May I have that question read?

(The last question was read.)

A. No, sir.

Q. (By Mr. Palmquist): All right, but he was with you last Tuesday? A. Yes, sir.

Q. What was the purpose of you and Mr. Wilmer going out there last Tuesday? [254]

A. We were returning from Flagstaff.

Q. What did you do in Flagstaff that week following the accident?

Mr. Wilmer: That is immaterial, if it please the Court, unless counsel has some impeachment foundation.

The Court: I don't see the materiality of it.

Q. (By Mr. Palmquist): You said you had no transportation. Flagstaff has taxicabs, do they not?

A. It would cost quite a bit of money for a taxicab.

Q. Well then, you can't say whether you ever saw any skid marks of any kind out there on the highway? A. No, sir.

Q. Let me ask you this. When you came up here and drew "R-3" you understood this map, you weren't confused as to the center line, were you?

A. No, sir.

Q. In fact, you and I discussed it and I made certain you understood this map, didn't I?

(Testimony of Gilbert Ripka.)

A. Yes, sir.

Q. When I told you to tell me where this accident happened there was some doubt in your mind even today as to which side of this center line this accident happened, isn't that correct?

A. No, there is no doubt in my mind.

Q. No doubt in your mind? [255]

A. No, sir.

Q. You still think you were down here five feet away from the center line?

A. Yes, sir.

Q. South of the center line?

A. South of the center line.

Q. And is it your contention that this violent accident this tragedy that happened that morning, can happen without leaving a mark south of the center line?

Mr. Wilmer: Just a moment. If it please the Court, that again is going way beyond the scope of cross-examination. What his contentions are are immaterial. What he saw, what he did we have no objection to it.

The Court: He has testified where it happened. That is his contention.

Q. (By Mr. Palmquist): Well, your contention includes almost as much area, to compare the two areas—well, about half as much—north of the center line of that highway as it does south of the center line, is that correct?

Mr. Wilmer: Now, I don't understand what counsel is referring to. I object to the question as not being intelligible.

(Testimony of Gilbert Ripka.)

Mr. Palmquist: I withdraw the question. I think it speaks for itself. He said that is where the accident happened. [256]

Q. (By Mr. Palmquist): Mr. Ripka, this is the truth, you are not certain where the accident happened and that is why you drew "R-3" as you did, isn't that correct?

A. I know it happened on the south side of the black line.

Q. But did you draw this line across this—this white line over to the north almost to the edge up here, right over where the car was found afterwards and made the various marks and so on, you drew this mark "R-3," didn't you?

A. Yes, sir.

Q. Mr. Ripka, so that you are not certain as to where the accident happened; it gets down to a question of what does the physical evidence show.

Mr. Wilmer: Just a moment. We object to that as being argumentative, if it please the Court.

Mr. Palmquist: I will withdraw the question. I have no further questions.

Mr. Wilmer: We have no questions at this time, your Honor.

The Court: Step down, Mr. Ripka.

NORMA JEAN SANDERS

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Palmquist: [257]

Q. You have been sworn I believe, have you not?

A. Yes.

Q. Would you tell us your full name?

A. Norma Jean Sanders.

Q. When were you born, Norma?

A. December 1st, 1935.

Q. You were seventeen at the time of this accident?

A. I was eighteen.

Q. Eighteen? A. Yes.

Q. Norma, your dad's full name was what?

A. Herbert Noah Sanders.

Q. He was a native of Missouri and so was your mother?

A. Yes.

Q. You were born where?

A. In Elijah, Missouri.

Q. How old was your father?

A. Forty-six.

Q. And what was the age of your mother?

A. She was thirty-nine.

Q. When you came out, your family came out to California, do you remember that?

A. Yes. It was back during the first of World War II.

Q. First of World War II? A. Yes. [258]

Q. That was in 1942, was it not? A. Yes.

(Testimony of Norma Jean Sanders.)

Q. Do you remember where you went first?

A. We were in Sacramento for about six months.

Q. What did your dad do in Sacramento?

A. He worked at a war factory or plant there.

Q. After six months at Sacramento where did you go?

A. We came to Oakland, California then.

Q. Before you came to California what kind of work had your dad done in Missouri?

A. He did construction work, road work, things like that.

Q. In Oakland what kind of work did he do?

A. During the war he worked in the shipyards, Moore Shipyards.

Q. Do you remember the name of the other shipyard he worked for?

A. I can't recall.

Q. Bethlehem?

A. Bethlehem.

Q. How long did he work at the shipyard?

A. Until 1948 or after the war anyway.

Q. In '48 do you remember where he went to work?

A. He went to work then at the Columbia Steel in Pittsburg.

Q. Do you know what he did at the shipyards and Columbia [259] Steel, what his rating was?

A. He was an outside machinist, a millwright.

Q. Millwright?

A. Yes.

Q. How long did he stay with Columbia Steel?

A. About three years, until 1951, I think it was.

Q. Then where did he go?

A. Then he went to work at Hunters Point.

(Testimony of Norma Jean Sanders.)

Q. That was the Federal Shipyard?

A. Yes, the naval shipyard.

Q. The Navy shipyard? A. Yes.

Q. How long was he at Hunters Point?

A. March, 1951, until October, 1953.

Q. Now, in October—by the way, what was your dad's rate of pay there when he left Hunter's Point?

A. He made about close to four hundred a month I think.

Q. Was he a civil service man?

A. Yes, he worked for civil service.

Q. In October, 1953, do you remember what happened?

A. Well, they had—you mean where he worked there?

Q. Yes, at Hunters, what happened to Hunters Shipyard?

A. They had a cutdown in their people, their work and things and he was laid off.

Q. What did your dad do after that? [260]

A. He went to night school, to Laney Trade and worked out of the union hall in Oakland.

Q. This Laney Trade, what is that school, who runs it? A. No, I don't.

Q. Do you know what he was studying there?

A. He was studying some kind of engineering.

Q. During the day he worked, you say?

A. Yes.

Q. Where did he work?

A. He worked out of the union hall there.

(Testimony of Norma Jean Sanders.)

Q. When you say out of the union hall, which union? A. This was the Machinists' Union.

Q. Machinists' Union? A. Yes.

Q. What did he do, get various jobs?

A. Yes.

Q. Do you know what the occasion was of you folks leaving Oakland and going over to New Mexico?

A. Well, yes, my father had heard about this job at White Sands, getting back into civil service, so we went out there to see about that.

Q. Did he want to get back onto civil service?

A. Yes, he did very much. He wanted to get back to get their benefits and retirement, things like that.

Q. Do you remember when you left [261] Oakland?

A. It was about June 12th I think, somewhere along there.

Q. Then where did you go?

A. Well, we went to White Sands, New Mexico.

Q. And did you stay at White Sands?

A. No, we stayed at a motel outside of Las Cruces.

Q. Las Cruces? A. Yes.

Q. What kind of place was this you stayed at?

A. It was an apartment and motel where they had housekeeping facilities.

Q. Did you folks have your own linen and so forth? A. Yes, we had our linen and dishes.

Q. How did you take those with you?

(Testimony of Norma Jean Sanders.)

A. On a trailer, we had a trailer.

Q. How many wheels was on that trailer?

A. It was a two-wheel trailer.

Q. With a tongue that hooked to the back of the car?

A. Yes.

Q. Do you remember what the sides of that trailer were?

A. It was like a pickup bed. It was made out of steel, then it was built up, had a wooden top to it.

Q. Wooden slats, were they?

A. Yes, sir.

Q. What was the color of those wooden slats?

A. I think they were just the natural wood color. I don't [262] think they had been painted.

Q. Did you folks own this trailer or was this one you had rented?

A. No, we owned it, we had bought it.

Q. Your dad had bought it?

A. Yes, sir.

Q. Was there a canvas or something that went over the top of it?

A. Yes.

Q. And when you stayed there at Las Cruces what did your father do?

A. He went out to White Sands to the Proving Grounds there and took the test and interviews for the job he was to get and he took a physical. And in the physical the doctors found that something——

Mr. Wilmer: Just a moment. If it please the Court, unless a proper foundation is laid, if she knows of her own knowledge what the situation is I have no objection, but if she is giving hearsay I object. There was no foundation laid for this testimony as of now.

(Testimony of Norma Jean Sanders.)

The Court: The witness couldn't conceivably testify to what the doctors found.

The Witness: This is what my father said, told his family.

Q. (By Mr. Palmquist): You mean what the family knowledge [263] was, is that right?

A. Yes.

Q. I would think she would be entitled to—was there a reason for the trip back to Oakland?

Mr. Wilmer: We withdraw our objection.

Q. (By Mr. Palmquist): All right. Will you tell us what the family knowledge was?

A. According to family knowledge, like I started to say, after my father had gone through these different tests and things and in the physical the doctor found something about his having these scars on his lungs and one of the doctors thought perhaps he had tuberculosis. And my father was kind of angry at it because he had been through it all before at different jobs he had. And he had pneumonia when he was quite young and that left scars on his lungs. He decided to go back to Oakland to get his civil service records from Hunters Point so he could more or less prove he didn't have it; he could have the job.

Q. Had you heard of the scars on your father's lungs before you had ever got to Las Cruces, New Mexico?

A. Oh, yes. It was common knowledge.

Q. How many times?

(Testimony of Norma Jean Sanders.)

A. Well, it was one of those things you know about of people I guess.

Q. Your papa had scars on his lungs, he grew up with that? [264] A. Yes.

Q. Did you know when or where or how he got these?

A. Why, yes, he had pneumonia when he was a boy and that left scars on his lungs. He had a very bad case of it.

Q. Had he had some arguments before, you say, on other jobs about these?

A. Yes. When he went to Hunters Point they found them then and it was proven of course it was the scar tissue.

Q. Scar tissue? A. Yes.

Q. Anyway, you then arranged to come back to get some records, is that it? A. Yes.

Q. To what, to send on to White Sands?

A. Yes.

Q. Now, that brings us to the actual trip. Do you remember what time you were packed up and left this cabin at Las Cruces and headed back to California?

A. We left I think around 3 o'clock Thursday morning.

Q. That would be the 9th of July?

A. Yes, it was the 9th of July.

Q. About 3 a.m. in the morning? A. Yes.

Q. And was there some reason why you started early in the morning? [265]

A. No, not really except for the heat, it would

(Testimony of Norma Jean Sanders.)

be easier traveling at night. We sort of arranged it that way.

Q. To avoid the heat? A. Yes.

Q. Where did your family stop that day, do you know? A. Albuquerque, New Mexico.

Q. Do you remember about what time it was when you stopped at Albuquerque?

A. I guess it was around 10 or 11 in the morning.

Q. Can you tell us how far it is from, if you know, from Las Cruces to Albuquerque?

A. I don't know the actual mileage.

Q. It took you from about 3 o'clock in the morning, about seven hours driving?

A. I suppose about that.

Q. Where did you stop at Albuquerque?

A. We stopped at a park they have there and we had a picnic lunch and my father rested until about 3 or 4 in the evening, then we went on.

Q. When you say your father rested, how did he rest?

A. We had blankets and pillows and things in the car, just laid down and went to sleep on them.

Q. Did he sleep? A. Yes.

Q. Do you know what time it was your family left [266] Albuquerque?

A. It was around 3:30 or 4 o'clock that evening.

Q. 3:30 or 4 that evening? A. Yes.

Q. Do you know how far it is from Albuquerque to where this accident happened?

A. No, I don't know the mileage there.

(Testimony of Norma Jean Sanders.)

Mr. Palmquist: If your Honor please, I would accept counsel's stipulation on that, if he knows.

Mr. Wilmer: That is one road I have never driven. I am sorry, I don't know.

Mr. Palmquist: I have a road map here. I figured it out, three hundred thirty-five miles. Perhaps you could check my figures.

Q. (By Mr. Palmquist): Anyway, it was late afternoon when you left Albuquerque?

A. Yes, sir.

Q. Did you stop some place for dinner, do you remember?

A. I can't remember where we stopped.

Q. But you did eat? A. Yes.

Q. Did you make various stops? Who all was in the car, by the way?

A. My father and mother and two younger sisters and myself. [267]

Q. Who was driving? A. My father.

Q. Did anyone else in the family drive besides your father? A. No, sir.

Q. Who was in the front seat with your father?

A. Myself and my younger sister.

Q. You were in the right front seat then?

A. Yes.

Q. Your younger sister was up there too?

A. Yes.

Q. Which younger sister, you have two.

A. The smallest one, Linda.

Q. Linda? A. Yes, sir.

Q. How old is Linda?

(Testimony of Norma Jean Sanders.)

A. She is eight now.

Q. Eight? A. Yes.

Q. She was seven then at the time of the accident? A. Yes.

Q. Where did your mother sit?

A. She was in the back seat on the driver's side, the left-hand side of the car.

Q. She was immediately then behind your father, is that correct? [268] A. Yes, sir.

Q. Then Wanda, I take it, was behind you?

A. Yes.

Q. And how old was Wanda?

A. She was thirteen at the time.

Q. Thirteen. Now, can you remember the last place your father stopped for coffee?

A. We stopped at the White Elephant Lodge.

Q. Where is that?

A. I don't remember exactly. That was around 12 o'clock that night.

Q. Did he have some coffee there?

A. Yes, we all had coffee.

Q. Did he do anything else there?

A. He bought some of these NoDoz pills.

Q. NoDoz pills? A. Yes, sir.

Q. Do you know what those are?

A. Sort of.

Q. Did he take any of those pills?

A. I don't know for sure if he did or not.

Q. You don't know. Then you started on, did you? A. Yes.

Q. Were you slumbering as you drove along?

(Testimony of Norma Jean Sanders.)

A. Yes, I was sleeping. [269]

Q. Was little Linda up between you and your dad sleeping? A. Yes, she was.

Q. Do you know whether Wanda was sleeping?

A. I don't know for sure. Like I said, I was sort of sleeping myself.

Q. After you left the White Elephant can you remember any other stop?

A. We stopped for gas outside of Flagstaff, I guess it was.

Q. At Flagstaff? A. Yes, sir.

Q. That was just before the accident happened?

A. Yes.

Q. Do you remember whether any of the children went to the bathroom there?

A. No, I don't remember. I was just about half asleep. I remember we stopped.

Q. Did you just stay in the car? A. Yes.

Q. And after he got gas at Flagstaff he drove on? A. Yes.

Q. Then you went back to sleep, did you?

A. Yes.

Q. What was the next thing you knew?

A. The next thing I remember was after the accident I guess. [270]

Q. I can't hear you.

A. I am sorry. I said the next thing I remember was after the accident happened.

Q. Were you still in the car?

A. No, I was thrown out of the car.

Q. You were thrown out of the car?

(Testimony of Norma Jean Sanders.)

A. Yes.

Q. You were seated next to the right-hand door then, is that correct? A. Yes.

Q. And when you were thrown out where did you land? A. I don't know really.

Q. Do you remember as to the center line on which side of the road you landed?

A. Well, no.

Q. Well, your dad was westbound on the right side of the highway, to you would be the north side.

A. I was off the road I think.

Q. Of the road, but were you south of the road or north of the road, that is what I am trying to find out.

A. I really couldn't say. I was too——

Q. Too shaken up? A. Too shaken up.

Q. I take it you were taken away from the scene of the accident, were you? [271] A. Yes.

Q. How did you leave the scene of the accident?

A. In a Greyhound bus.

Q. How long after the accident was that?

A. I really don't know.

Q. I want to ask you some things about your folks. Your mother's first name was what?

A. Delphia.

Q. You say Delphia was thirty-nine, your dad was forty-six? A. Yes.

Q. Did you father drink? A. No, sir.

Q. Did he smoke? A. Yes.

Q. What did he smoke when he smoked?

A. A pipe usually.

(Testimony of Norma Jean Sanders.)

Q. Was he a man that came home nights?

A. Yes.

Q. What time did he get home?

A. About 6:30 or 7.

Q. Right after work? A. Yes.

Q. Was he a man that would ever go to the grocery store to buy groceries?

A. Yes, he would usually get the groceries. [272]

Q. Did he entertain his family, did he take you places? A. Yes.

Q. And what kind of health was he in?

A. Good health, as far as I am concerned.

Q. Did you ever know of him ever having any tuberculosis as such, such as was suggested by this doctor? A. No, definitely not.

Q. Do you know as a matter of fact your father was in good health and did not have tuberculosis?

A. Yes.

Q. Was he a man that could put in a good day's work? A. He always did.

Q. Did you ever know of him staying at home from work because was sick? A. No.

Q. Do you know of him going to any doctors for any lung condition or any other condition for that matter? A. No.

Q. Was he a man that would devote his time to his family? A. Yes.

Q. How was he with money, was he a man that would save money or not?

(Testimony of Norma Jean Sanders.)

A. Well, if he had something he was saving for something, yes, and so on like that I guess.

Q. After this accident was over was there some money found [273] in your effects, the effects belonging to your folks? A. Yes.

Q. And where was that found?

A. Well, it was in a suitcase originally. I don't know exactly where it was found.

Q. Did you know how much money was in that suitcase originally? A. Approximately so.

Q. And was that money turned over to you girls? A. Yes.

Q. And how much money was that?

A. About \$2,400.

Q. \$2,400? A. Yes.

Q. That was in cash? A. Yes.

Q. Was your dad a man that liked to work?

A. He always enjoyed his work, from what he said.

Q. How did he get along with the family?

A. Very well.

Q. How did he get along with other people, people he worked with?

A. From what he said he got along well. He wasn't the type person who caused any trouble, anything like that.

Mr. Palmquist: You may cross-examine. [274]

(Testimony of Norma Jean Sanders.)

Cross-Examination

By Mr. Wilmer:

Q. Miss Sanders, do you have a clear recollection as to what time you left Las Cruces the morning of the 9th, was it 3 or was it 4 o'clock?

A. It was somewhere around there. I couldn't say for sure.

Q. Do you know how far your father proposed to drive after he left Flagstaff?

A. No, I don't really know, until morning.

Q. You did not discuss with him when you pulled away from Flagstaff or he didn't tell you how far he was going to drive on that night?

A. No.

Q. Was he in the habit of making trips like that of driving long hours?

A. Well, not really. We hadn't made that many trips for that matter.

Q. For instance, coming over from Oakland to Las Cruces did he drive as much as twenty-four hours at one time?

A. No, sir.

Q. Do you remember talking to the patrolman Bryfogle in the hospital or some place the day following the accident?

A. Vaguely.

Q. Do you remember talking to an officer?

A. I remember some officer came in right after we got to [275] the hospital.

Q. Do you remember discussing with him whether or not your father had actually been using

(Testimony of Norma Jean Sanders.)

the NoDoz tablets? A. No, I don't.

Q. You had no discussion of that character with him? A. I don't remember.

Q. The decision to leave Las Cruces and return to Oakland or to Hunters Point, was that a sudden decision or was that one your father made or left in accordance with the plans you previously made?

A. We were planning to come back to White Sands. You might say it was sudden.

Q. I mean by that you knew the day before you were going to return, did you not? A. Yes.

Q. But you say you were going to Hunters Point to get these records and then return to Las Cruces? A. Yes.

Mr. Wilmer: That is all.

Mr. Palmquist: No further questions.

Mr. Palmquist: Norma, you may stay in now.

Mr. Wilmer: I have not agreed to any witnesses staying in the courtroom.

Mr. Palmquist: I am sorry. [276]

SANDRA MARTINEZ

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Palmquist:

Q. Mrs. Martinez, your first name is Sandra, is that correct? A. Yes.

Q. Do you mind telling us your age?

(Testimony of Norma Jean Sanders.)

A. I am twenty-seven.

Q. Twenty-seven. And you are a married lady?

A. I am.

Q. And what is your husband's first name?

A. James.

Q. Your husband Jim, what is his occupation?

A. He is toll transmission man for the Pacific Telephone and Telegraph Company.

Q. How long has he been an engineer with the Telephone Company? A. For eight years.

Q. You folks have been married for how long?

Mr. Wilmer: If it please the Court, I don't see where this matter is material. We are trying a case that involves, I am sure, the very pleasant lady and her husband, but I don't believe——

Mr. Palmquist: This will tie in with how she knew the [277] Sanders and so forth.

The Court: On that avowal you may proceed.

Q. (By Mr. Palmquist): How long have you folks been married? A. Seven years.

Q. Now, did you folks at some time in your married life get to know Mr. and Mrs. Sanders?

A. Yes, we did.

Q. And what was the occasion of you folks getting acquainted?

A. We lived right across the porch from one another.

Q. That was there in Oakland?

A. Yes, it was.

Q. Did you know their children?

A. Yes, we did.

(Testimony of Norma Jean Sanders.)

Q. Did you get to know Mr. Sanders and Mrs. Sanders? A. Yes, I knew them both.

Q. What year was that when you first got to know them?

A. That was in June of 1953.

Q. When did you first meet them?

A. Or 1952. Let me see—yes, 1952, June.

Q. Did you have a child that Mrs. Sanders would take care of? A. Yes.

Q. How old was that child? [278]

A. Let me see, she was almost a year when we moved there. She was a year in October, 1952.

Q. Did Mrs. Sanders baby sit for you?

A. Yes. I was working during the day and she took care of my little girl.

Q. Where were you working?

A. I worked at Montgomery Ward's in Oakland.

Q. Did you pay Mrs. Sanders money to baby sit with your child while you worked?

A. Yes, I paid her weekly.

Q. Do you remember how much you paid her?

A. I paid her \$10 and on Tuesday evenings I took a class and paid her \$11 a week.

Q. \$11 a week to take care of your child?

A. Yes.

Q. Later I believe you moved from that area, did you? A. Yes, we did.

Q. And you folks bought a home out in Concord, in the suburbs there? A. Yes.

Q. Did the Sanders ever come out to see you?

A. Yes, they did.

(Testimony of Norma Jean Sanders.)

Q. You kept in touch with them after that?

A. Yes.

Q. Could you tell us something about Mr. Sanders as to his [279] character, habits and apparent health.

A. He was a very fine person. He was neighborly and very friendly. He worked during the daytime as did my husband and myself. We saw him in the evening. As to his health, he seemed to be in fine health. As I say, he worked all the time. He was awfully good with his children and awfully good with my little girl. He was usually at home about the same time we got home from work. He would often be playing with her and the other children.

Q. Was he a family man?

A. Definitely, yes.

Q. He liked his family?

A. He seemed to love them very much.

Q. Was he a working man?

A. Yes, he worked every day as long as I knew him.

Q. Did you ever know of him, any time you knew him ever having to be home sick for any reason?

A. No, I can't recall he ever missed a day as far as I knew. He was gone when we left for work every morning, when we took the child over to their home.

Q. By the way, do you know whether or not he ever drank as such?

(Testimony of Norma Jean Sanders.)

A. No, I don't believe he drank at all.

Q. Neither Mr. or Mrs. Sanders?

A. Not that I know of. [280]

Q. Do you know anything about their thrifty-ness or frugality as such?

A. I don't know any amount of money they were saving but I know they were budget conscious and that they did a lot of shopping for the girls and so forth at Montgomery Ward, for the girls, where I worked, which is where I buy a lot of my things.

Q. In other words, they watched their pennies?

A. Why, certainly.

Q. Could you tell us something about Mrs. Sanders, her character, habits, health?

A. She was a wonderfully loving person, very friendly, not mushy. And seemed to really love children and know how to handle them and get along with them. We appreciated so much her attention and love of our little girl when we couldn't be with her. She was always in good health. I worked a little over a year and I never had to stay home with my child because of her ill health. She seemed to manage her home very well. It was always neat and clean.

Q. She was a good homemaker, was she?

A. Very definitely. She was conscious of keeping the home clean. I know because my little girl was at a creeping age and she was concerned about the cleanliness of the floor and so forth.

Mr. Palmquist: You may cross-examine. [281]

Mr. Wilmer: No questions.

Mr. Palmquist: We now have some depositions, if your Honor please, testimony to offer by way of deposition. I do have a picture of the decedents—I seem to have mislaid it here, but I will find it overnight and offer that tomorrow. In the meantime we can read the depositions into evidence.

The Court: I think in view of the hour we can do that in the morning. At this time, Gentlemen, we will recess until 9:30 in the morning, that is thirty minutes earlier. I will ask you to be here at that time promptly, please. And during the overnight adjournment bear in mind the admonition.

(Whereupon a recess was taken at approximately 4:30 o'clock p.m. until the following morning, Saturday, August 6, 1955, at the hour of 9:30 o'clock a.m.)

The Court: You may proceed.

Mr. Palmquist: At this time, if your Honor please, we would like to offer the deposition of Howard Pease, taken in Oakland July 29th, and would like to read it into the record.

The Court: If it is going to be read in I don't know whether there will be objections or not—

Mr. Palmquist: Under the stipulation the objections were reserved.

The Court: Let's mark it for identification then and read it as marked for identification. That is Howard Pease? [282]

Mr. Palmquist: Yes, your Honor. I suggest Mr.

Scoville read the answers; I will ask the questions. If there are any objections counsel can make them at the appropriate time.

(Plaintiff's Exhibit 38 marked for identification.)

Mr. Scoville: Is that procedure agreeable with the Court?

The Court: Yes.

Mr. Palmquist: We will eliminate the preliminary pages to get down to the questions and answers, starting on page 4.

(Whereupon the deposition of Howard Pease, Plaintiff's Exhibit 38 for identification, was read to the Court and jury.)

Mr. Palmquist: The next deposition we wish to offer would be the deposition of Marilyn Tulley, taken at the same time, July 29, 1955, in Oakland.

(Plaintiff's Exhibit 39 marked for identification.)

(Whereupon the deposition of Marilyn Tulley, Plaintiff's Exhibit 39 for identification, was read to the Court and jury.)

Mr. Palmquist: The next deposition, if your Honor please, will be the deposition of Mildred M. Saunders.

(Plaintiff's Exhibit 40 marked for identification.)

(Whereupon the deposition of Mildred M. Saunders, Plaintiff's Exhibit 40 for identification, was read to the Court and jury.) [283]

Mr. Palmquist: The next deposition, if your Honor please, will be the deposition of Ellen Onstott.

(Plaintiff's Exhibit 41 marked for identification.)

(Whereupon the deposition of Ellen Onstott, Plaintiff's Exhibit 41 for identification, was read to the Court and jury.)

Mr. Palmquist: The next deposition and the last one is the deposition of James Martinez.

The Court: It will be marked Plaintiff's Exhibit 42 for identification.

(Plaintiff's Exhibit 42 marked for identification.)

(Whereupon the deposition of James Martinez, Plaintiff's Exhibit 42 for identification, was read to the Court and jury.)

(The following reference was made to a motion on page 13.)

Mr. Wilmer: We have no objection.

The Court: Let the record show that in the deposition of James Martinez, page 13, counsel for the defendant withdraws the motion to strike made at the taking of the deposition.

Gentlemen, we will recess at this time for about five minutes.

(Recess.)

WANDA SANDERS

called as a witness herein, having been first duly sworn, testified as follows: [284]

Direct Examination

By Mr. Palmquist:

Q. Please state your name?

A. Wanda Sanders.

Q. Wanda Sanders? A. Yes.

Q. How old are you now, Wanda?

A. Fourteen.

Q. At the time of the accident you were thirteen?

A. Yes.

Q. What was your father's name?

A. Herbert Noah Sanders.

Q. How old was your father at the time of the accident? A. Forty-six.

Q. Your Mother's name?

A. Delphia Flossie Sanders.

Q. What was your mother's age at the time of the accident? A. Thirty-nine.

Q. Wanda, where do you live now?

A. 2261 Herron Drive, Concord.

Q. Do you remember the accident?

A. No.

Q. Do you remember the trip leaving Oakland?

A. No.

(Testimony of Wanda Sanders.)

Q. You had a head injury in this accident?

A. Yes. [285]

Q. So you couldn't help us by telling us whether you were awake or asleep or not at the time of the accident?

A. No, I can't.

Q. You can't remember? A. I am sorry.

Q. You can't remember the trip now?

A. No.

Q. Do you remember any part of it?

A. No.

Q. Do you remember Albuquerque for example?

A. No. I have a hard time because we used to go back to Missouri and we stopped there often and I can't remember if we stopped on that trip or not.

Q. When you stopped in Albuquerque on the trip to Missouri that was the trip before this trip?

A. I think so.

Q. On your dad's vacation? A. Yes.

Q. Can you remember where you stopped at Albuquerque, the name of the place?

A. I remember this motel is called the Skyline Motel, because we stopped there quite often.

Q. What was the condition of your dad's health?

A. He was in good health.

Q. What kind of work did he do? [286]

A. Well, he was more or less a machinist.

Q. Did he work every day? A. Yes.

Q. Did you ever know of your dad being sick and off work for any length of time? A. No.

Q. What was your mother's health?

A. She had also good health.

(Testimony of Wanda Sanders.)

Q. Wanda, I asked you girls to find me a recent picture of your mother and father, as recent as you could. Did you make such a search?

A. It was pretty hard to find a recent picture of mother and dad, but I did find one.

Q. You did find one? A. Yes.

(Plaintiff's Exhibit 43 marked for identification.)

Q. (By Mr. Palmquist): Wanda, when was this snapshot of your father and mother taken?

A. It was a year ago last Christmas.

Q. That would be the Christmas before the accident, about six months before the accident, right?

A. Yes.

Q. Is that a correct representation of your mother seated over here and your father there?

A. That is right. [287]

Mr. Palmquist: If your Honor please, we offer this in evidence at this time.

Mr. Wilmer: We have no objection.

The Court: It may be received.

(Plaintiff's Exhibit 43 marked in evidence.)

Q. (By Mr. Palmquist): Now, just to identify the picture, this is your father here?

A. That is right.

Q. And this is your mother here?

A. That is right.

Q. This is you here? A. That is right.

Q. Got a bandaid; and this is your younger

(Testimony of Wanda Sanders.)

sister? A. Yes.

Q. And this is one of your mother's babies she was sitting with? A. Right.

Mr. Palmquist: I have no further questions.

Mr. Wilmer: No questions.

(Witness excused.)

Mr. Scoville: If your Honor please, at this time the plaintiff would like to offer in evidence the American experience from the mortality tables showing the expectation of life at various ages as the same appears from the tables in the Arizona Code of 1939. [288]

Mr. Wilmer: If it please the Court, we make no objection as to the authenticity of the tables or—what you want to call it—the necessary form of showing, but in the absence of a cautionary instruction on the limitation as to the purpose and the effect, we object to it.

Mr. Scoville: I think that such matters as counsel refers to is a matter to be covered by instruction. The mere offer is appropriate and should be in evidence.

The Court: There will be an instruction regarding mortality tables and how they are compiled and what they mean. In other words, their relations to average people.

Mr. Scoville: Yes. I presume that will be covered by the instruction, but I believe it is appropriate we put the mortality tables for the American experience in evidence.

Mr. Wilmer: With that understanding we have no objection.

The Court: I suppose by putting them into evidence you will read into the record the expectancy of a person age forty-six and a person age thirty-nine.

Mr. Scoville: That is all I presume to do.

The Court: Very well.

Mr. Scoville: The mortality table referred to and the statement just made by the Court reflect that for a person forty-six years of age the expectation of life, by the [289] American experience, is a period of 23.81 years. The tables further show that for a person thirty-nine years of age the expectation of life, according to the American experience, is 28.90 years.

The plaintiff rests.

Mr. Wilmer: We have a matter we would like to present to the Court.

The Court: Very well. Gentlemen, counsel have indicated they have a matter they desire to present to the Court. That can properly be done only in the absence of the jury. I will have to ask you at this time to please retire from the courtroom but don't go too far away because we will be calling you shortly. You may retire at this time. While outside bear in mind the admonition given you heretofore.

(Jury retires from the courtroom.)

Mr. Wilmer: If it please the Court, in the absence of the jury the defendants move the Court at the conclusion of all the evidence to direct the

jury to return a verdict in favor of the defendants and against the plaintiff; or in the alternative to dismiss the action, upon the following grounds:

First, on the ground there has been no proof with respect with the method or means by which the jury would determine the proper amount and measure of damages in the event a verdict was found for the plaintiff. In that, the [290] matter of determining the present worth of any given valuation is not a matter within the experience of a layman, but is a matter that lies entirely and solely within the realm of scientific and expert testimony. And there being no such evidence in the record there is nothing upon which the jury can properly deliberate and arrive at a verdict.

Secondly, upon the ground that the most the evidence of the plaintiff indicates is speculation and surmise as to the cause of the accident. The plaintiff has the burden of proving that the accident was caused by the negligence of the defendant. While of course we are not unaware of the rule that all inferences which may legitimately and properly be drawn and on a motion of this character, are drawn in favor of the plaintiff, nonetheless we say that the most the evidence supports is a speculation or surmise as to how the accident occurred and therefore is insufficient.

Thirdly, on the ground that the complaint alleges the action is brought by a general administrator of the estates of each of the two deceased persons. The proof offered in support of that is a certified copy of special letters of administration which are

in no fashion specified what the powers of the special administrator are. The statute provides that a special administrator may be appointed in the case of delay in appointment of an administrator or where from other circumstances it is necessary one be appointed. [291] And specifically provides that the powers of a special administrator shall be specified in the order of appointment. I do not think there can be any presumption that a special administrator has authority merely because he chooses to exercise it. I think we must bear in mind the fact that the procedure for the probate of estates and appointment of administrator is purely statutory. Therefore, there is no presumption of powers unless those powers be found in the statute. We urge that for this reason, if it please the Court, that we are in this predicament: If the Court did not have jurisdiction in making this appointment because it was not made on the basis of delay, and if in the order of appointment, which is not before your Honor, there was not authority granted specifically to bring this action, then we have a question of jurisdiction involved. And if the plaintiff who presumed to act in this case in fact was not properly appointed a special administrator, or, in fact, was not authorized to bring the action, we may be well at the hazard of trying a lawsuit and in the event the verdict of the jury is favorable, nonetheless be met by the fact the plaintiff in this case had no jurisdiction, a general administrator be appointed and again have the hazard of litigating the cause.

The Court: The last point you made, Mr. Wilmer, gave me some concern, but I find authority for an action of this [292] nature by a special administrator, and I think I can take care of it. Anyway, in the event there should be a verdict here against you I think I can protect everybody concerned by withholding the entry of any judgment until and unless a general administrator is appointed, qualified and is substituted for the special administrator.

Mr. Wilmer: Your Honor, may I say without arguing, I am not worried about that contingency. I am worried about the contingency that should there be a verdict in our favor how are you going to protect us then?

The Court: I think that the special administrator has the authority to bring the action. I mean I was concerned more about how, if a judgment were rendered, how you could be protected and assured. It is my understanding from the brief research I did that the special administrator here, the statute, wrongful death statute says a personal representative may bring it. That would include a special administrator. He brings it in the nature of a trustee for the next of kin. I was only concerned about the satisfaction of the judgment in the event there should be a judgment against you.

Mr. Scoville: I may say this action can be maintained by the next of kin or next friend by the express language that provides for it. This is necessarily *res adjudicata*, what happens here. [293]

The Court: I feel that way about it. I was concerned about it from the practical aspect.

Mr. Scoville: I think that is true, we would have to be fully qualified before we could receive it.

The Court: I think I could control that situation in the matter of judgment. Call the jury, please.

Mr. Wilmer: The motion is then denied, your Honor?

The Court: The motion is denied.

(Whereupon the jury return to the courtroom.)

HAROLD F. EDWARDS

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. State your name for the Court and jury.

A. Harold F. Edwards.

Q. What is your occupation or profession?

A. I am a doctor, M.D.

Q. Medical doctor? A. Yes, sir.

Q. What school did you graduate from, Doctor?

A. University of Colorado Medical School.

Q. When did you graduate? A. 1947.

Q. Following your graduation what type of practice did [294] you pursue?

A. Well, I took an internship of course and a short residency afterward. Immediately after that I went into general practice of medicine and surgery.

(Testimony of Harold F. Edwards.)

Q. Where did you go into general practice?

A. In Denver, Colorado.

Q. Where are you practicing at the present time? A. Lander, Wyoming.

Q. How long have you practiced there?

A. I went to Lander in the spring of 1950, and I left there and went into the service the first of July of '53. And I was discharged from the service the 30th of June and went back to Lander.

Q. 30th of June of this year?

A. Yes, sir, that is right.

Q. Now, Doctor, during the time you were in the service I take it you were in the medical branch of the service? A. That is right.

Q. Where were you stationed?

A. White Sands Proving Ground, New Mexico.

Q. That is near Las Cruces?

A. About twenty-five or thirty miles from Las Cruces, yes, sir.

Q. Did your duties include that of interviewing and making examination of applicants for employment? [295] A. Yes, sir.

Q. I mean by that physical examination?

A. Yes, sir.

Q. Did you make a physical examination of a man by the name of Sanders? A. Yes, sir.

Q. When did you make that examination?

A. I wouldn't remember except for the date on these X-rays, which was June 29, I believe.

Q. And these X-rays were taken by your request and direction, were they?

(Testimony of Harold F. Edwards.)

A. Yes. A chest X-ray was routine and with pre-employment physical examination.

Q. That was Mr. Herbert Noah Sanders?

A. I believe that name is correct, yes, sir.

Q. After you had received the first X-ray, Doctor, did you request a second X-ray?

A. I believe I did, at least subsequent X-rays were taken.

Q. And when were they taken?

A. The forepart of July.

Q. Do you have the X-rays with you?

A. Yes, sir, I do.

Q. Could you give us the exact dates from them?

A. That was June 29, that was the initial——

Q. Of 1954? [296]

A. Yes, sir. And the subsequent X-rays were taken the 2nd of July.

Q. After you had received the X-rays did you have a conversation with Mr. Sanders?

A. Yes, sir, that is right.

Q. Did you report to him the opinion you had come to with respect to his physical condition?

A. Yes, sir, I did.

Q. What did you tell him?

A. I just informed him that we had to reject him for employment and that he had some trouble in his chest, and it appeared to be tuberculosis; and that he should seek medical care and determine the exact cause of his X-ray findings and chest findings.

Q. Now, Doctor, when you made that statement

(Testimony of Harold F. Edwards.)

to Mr. Sanders what did he tell you, as best you can recall?

A. You mean when I told him of his condition?

Q. When you told him of his condition did he tell you anything with respect to having had pneumonia and having scars on his lungs?

A. Not that I recall, no, sir.

Q. What did he tell you?

A. I don't recall that he gave me any history relative to his chest.

Q. Did he tell you what he proposed to do with respect to [297] your recommendation?

A. Yes. He had some relatives I believe in California and he was going there, I believe—now, this is as I remember it—he was going there and was going to get medical care to determine the status of his chest condition.

Q. Did he state anything with respect to his financial ability?

A. Yes. He said he didn't have any money, I recall that, said he didn't have any money, didn't know what he was going to do.

Q. It was your conclusion from the examination of the X-rays and reports he did probably have active tuberculosis?

A. It seemed reasonable he did. I couldn't say on the basis of an X-ray he had active tuberculosis, but at least it was suggestive of that fact, yes, sir.

Mr. Wilmer: Cross-examine.

(Testimony of Harold F. Edwards.)

Cross-Examination

By Mr. Palmquist:

Q. Your name is Harold Edwards, is that right?

A. That is right.

Q. Doctor, can I ask you how old you are?

A. I am forty-two.

Q. I noticed you didn't graduate from medical school until 1947.

A. That is right, sir. [298]

Q. Then you said you went into the service. That was because of your training, wasn't it, as a doctor?

A. I had some training under the Army A.S.T.P. program, that was the doctors' draft law, the reason I was called.

Q. And as a result of this doctors' draft law they sent you down to White Sands, is that correct?

A. Yes, sir, I was assigned there.

Q. Now, the government at White Sands in that project, like any employer, wants to make sure they get strong, healthy men for the money they pay out, isn't that correct?

A. Well, I don't know whether that is the purpose of the physical examination or not. People are hired with some physical disabilities where it is compatible with the job and so on. The main point that a doctor's responsibility is because of the compensation laws to later have a claim against the

(Testimony of Harold F. Edwards.)

government. That is the main reason for physical examination, as I see it.

Q. Doctor, while you were down there how many men do you think you examined, applicants?

A. For civil service. I just can't answer that exactly. We would rotate the duties of examining civil service employees. When we were officer of the day the doctor who was officer of the day would examine civil service applicants for that day.

Q. Doctor, I don't want to interrupt you. You understood [299] my question I am sure. My question was how many applicants had you examined while you were down there? I didn't want you to give me a talk about who did it, how or when. If you can't answer it say so, if you can give me some answer.

A. I can't give you a definite figure how many I examined. We would catch it about four, five or six days; when we did catch it we usually had about ten a day. That is a rough figure, that is not anywise correct I am sure, but it will give you some idea.

Q. Of these ten men would you remember them?

A. No, I wouldn't remember everyone, no, sir.

Q. Was there something about this man that made him stand out from all of the people you met at White Sands, New Mexico?

A. Yes, sir, there was.

Q. What was that?

A. His chest condition.

Q. His chest condition. You mean you didn't

(Testimony of Harold F. Edwards.)

find any other men with a chest condition down there? A. I wouldn't say that, no.

Q. Or is it that you have had your memory refreshed when you learned you were to be a witness in this case?

A. Well, I remembered the case before my memory was refreshed.

Q. Well, Doctor, I suppose like all doctors you would take [300] a history from the people, questionnaires?

A. We usually got some history, yes, sir, relative to their employment.

Q. In fact, I imagine one of the questions you would be certain to ask was, "Have you ever had any tuberculosis."?

A. That probably would be right. I don't recall asking Mr. Sanders that but I imagine I did, I must have.

Q. And you must have written those answers down, didn't you? A. Not necessarily.

Q. Have you got a piece of paper there?

A. I was just seeing this. I didn't know this was here. Let me look it over just a minute. Do you know where this came from?

Mr. Wilmer: No, I don't.

The Witness: It was in this X-ray envelope.

Mr. Wilmer: It came with the X-rays if it was in the envelope.

Q. (By Mr. Palmquist): Did you bring these or did Mr. Wilmer bring these to Court?

(Testimony of Harold F. Edwards.)

Mr. Wilmer: They were sent to me from White Sands, Mr. Palmquist.

Mr. Palmquist: You mean the Government is sending you records now?

Mr. Wilmer: I got them. [301]

The Witness: He did give me a history of having had pneumonia. That is on the record here.

Q. (By Mr. Palmquist): Doctor, may I ask you this question? A. Yes, sir.

Q. Do you think sometimes the faintest ink is better than the strongest memory?

A. Pardon?

Q. Do you think sometimes the faintest ink is more retentive than the strongest memory?

Mr. Wilmer: That is argumentative and speculative.

Mr. Palmquist: I withdraw the question.

Q. (By Mr. Palmquist): Doctor, may I see what you are looking at there?

A. Yes, if it is all right with the attorney.

Mr. Wilmer: Surely.

Q. (By Mr. Palmquist): You mean it has to be all right with him before I can look at this?

A. No, I can't say that. It isn't mine.

Q. Whose property is this, Doctor?

A. I can't answer that. Perhaps Mr. Wilmer can answer that. I don't know.

Q. You don't know these are the X-rays of Mr. Sanders then as far as that goes, do you?

A. I couldn't prove it, no, sir. That is a matter

(Testimony of Harold F. Edwards.)

of [302] record, however. There is a number on the X-ray.

Q. All right. Can I, Doctor, see these other papers you have there? A. Yes, sir.

Mr. Palmquist: If the Court will pardon me just a moment while I look these over.

Q. (By Mr. Palmquist): Doctor, this form I have been looking at is the form that is furnished you by the United States Civil Service Commission, is that correct?

A. Yes, sir. The applicants would come over to the infirmary with such a form.

Q. You had not seen this form or didn't know it was in this envelope? A. That is right.

Q. Until you got on the witness stand?

A. That is correct, sir.

Q. Let's see if there is anything else in here.

A. That is a good idea.

Q. Apparently we got it all. Now that you have seen this form, and you have seen this form before, haven't you? A. I signed it, yes, sir.

Q. You recognize your signature on it?

A. Yes, sir.

Q. Do you have any knowledge how this sacred document got out of the files of the United States Civil Service Commission? [303]

A. I have no idea, no, sir.

Q. But you do recognize it as a genuine document, right?

A. Yes, sir, I don't think there is any doubt about that.

(Testimony of Harold F. Edwards.)

Q. And when you went through the examination of an applicant with this kind of a form you would ask him questions, wouldn't you?

A. Certainly.

Q. You would probably say to him, "Have you ever had any T.B.; have you ever been in any serious accidents; were you in the war, were you ever gassed," or "What childhood diseases," the things doctors ask people?

A. Yes, sir. The way it was usually worded, if they had any serious diseases or surgery or serious injuries of any type, that was usually the way that was asked.

Q. Then you would say what the facts were of what you wrote in July of last year would probably be more authentic than what you said, even if under oath, in July of '55?

A. What I have written here is a matter of record; I would say that would be authentic. However, everything isn't written on those forms certainly.

Q. Well, what have you been doing the last year?

A. What have I been doing?

Q. Since the time you signed this in July of last year?

A. Well, I was an officer in the Army until June of this year, June 30th of this year, at which time I was discharged. [304]

Q. You have been out a month now?

A. Roughly a month.

Q. Glad to be out?

A. That is right, yes, sir.

(Testimony of Harold F. Edwards.)

Q. I imagine there were any number of things that occupied you besides this one little man from California that was trying to get a job?

A. Certainly.

Q. You probably never thought of him again, did you?

A. Well, his initial X-ray, I had sent it down to William Beaumont Army Hospital to get a reading by a radiologist down there. Those are the two little slips you have there. While waiting for the reading to come back he was in almost every day. I saw him, oh, two or three times there, I can't just remember the dates, but subsequent to my initial examination he was back making inquiries. He was very eager to go to work of course.

Q. Doctor, you failed to answer my question. Would you read the question?

(The last question was read.)

A. I did think of him again, both when he came back and I heard later through Dr. Strand that he had been killed in an accident.

Q. Been killed in an accident?

A. I heard that from Dr. Strand. That was by way of [305] conversation.

Q. Who was Dr. Strand?

A. He was the post surgeon there.

Q. Apparently he impressed Dr. Strand enough so that Dr. Strand remembered his name?

A. Apparently so, yes, sir.

Q. Something made him stand out?

(Testimony of Harold F. Edwards.)

A. Yes, sir.

Q. You think that something was he would make a trip to California and was going to come back to New Mexico with some other United States Civil Service Commission records?

A. I think it was his chest condition that made him or caused him to be remembered by the doctors there. It was Dr. Strand's duty as post surgeon to do the final rejecting. In other words, I could reject a man and he could reverse the decision if he wished. He was post surgeon, I wasn't. I wasn't at that time, certainly.

Q. Let me ask you this, how much experience have you had with tuberculosis?

A. I can't answer that, sir. Certainly in medical school and in practice anytime you see a chest X-ray you have to think of it if there is anything suggesting it. To tell you how much experience I have had in tuberculosis, I am unable to answer that.

Q. You know the history of T.B.? [306]

A. Somewhat.

Q. It has gone under various names, has it not?

A. Tuberculosis?

Q. Yes.

A. It is mistaken diagnosis in many cases, yes.

Q. It is a mistaken diagnosis in many cases, is that what you just said?

A. You asked me if it went under different names. True, tuberculosis, as far as I know, has never been under any other name, but what I

(Testimony of Harold F. Edwards.)

thought you meant, sir, was when you said it was under different names, a person may have a chest condition and he may call it other than tuberculosis. That is the way I meant my answer to be. I didn't mean to be misleading there at all.

Q. Doctor, originally they called it consumption, is that correct?

A. It has been known as that, yes, sir.

Q. A consumptive cough? There was at one time a great deal of ignorance about tuberculosis, even amongst medical men, is that correct?

A. That is true of everything in medicine.

Q. Have there been new discoveries about tuberculosis even within the last fifteen years?

A. What do you mean by new discoveries?

Q. In relation to the new antibiotics, penicillin and [307] drugs?

A. Treatment has changed in the last fifteen years, yes, sir.

Q. Would you agree with the statement made by a medical man that tuberculosis is no longer the mystery, no longer a medical problem?

A. I would not agree that it is no longer a medical problem because people are still dying with tuberculosis certainly.

Q. People die from various causes every day despite doctors, isn't that right?

A. Yes, sir. But it is for that fact it is still a medical problem.

Q. Yes. Well, right in this city I understand there is a great T.B. clinic?

(Testimony of Harold F. Edwards.)

A. I have been told that. I am not acquainted around here however.

Q. So there should be some men around here that should know something about tuberculosis?

A. I imagine there are, certainly.

Q. Now, Doctor, did you ever have pneumonia at any time in your life?

A. Have I personally had pneumonia? Yes, sir.

Q. Did it leave scar tissues on your lungs?

A. That is a difficult question for me to answer. I have [308] a low grade bronchiectasis in my chest.

Q. What is that?

A. It is a chest condition. To say that that came from pneumonia, I can't say that it has or hasn't or whether it was congenital in origin.

Q. Could that be the brand of cigarettes you smoke? A. No, I don't think so.

Q. This bronchiactesis, you mean by that the medical name for it is rales, could that be a name?

A. No, bronchiactesis is a condition. Rales is what you hear with your stethoscope.

Q. Could you hear a——

A. Bronchiectasis?

Q. With a stethoscope?

A. Sometimes you may if there is some congestion in there, certainly.

Q. I could be described as rales of those lungs?

A. It could be, yes, sir.

Q. Would you check here——

(Testimony of Harold F. Edwards.)

A. I read that. I think it says, "Rales in both chests."

Q. In other words, if I were a medical doctor and had my stethoscope I could write down the same thing about you that you wrote about Mr. Sanders, that is, you have rales in both lungs?

A. Only if I have a little cold and so on, little [309] congestion, then you might hear rales in both chests. That is true of anyone else.

Q. That wouldn't mean you had tuberculosis, would it, Doctor?

A. No, it wouldn't. Rales in both chests means there were findings in both chests and then the X-ray of course gives you further insight. Those are just findings. It is no attempt at diagnosis. Those are just physical findings.

Q. Now, Doctor, you tested this man's heart and blood vessels, didn't you?

A. I went over him quite thoroughly.

Q. And he had a very good blood pressure, didn't he, it was 120, is that, 120/80 or changed to 74?

A. 74 is the lower figure. That top, it is probably 100/74.

Q. Someone had written 120.

A. Yes. The corpsmen do the blood pressures and take the visual readings and so on.

Q. One of the nemeses of senility or old age or as we all wear out is high blood pressure, isn't it, something we have to fear, isn't it?

A. Some people have to fear it. Not all old people have high blood pressure.

(Testimony of Harold F. Edwards.)

Q. This man didn't have high blood pressure, very normal blood pressure?

A. No, certainly it isn't high. [310]

Q. And you found he was very normal for his age as to his heart and blood vessels?

A. Heart and blood vessels very normal for his age.

Q. If a man had been fighting tuberculosis that could affect his blood pressure, wouldn't it?

A. Well, that is kind of hard to say. A man with tuberculosis wouldn't necessarily need to have high blood pressure or low blood pressure. On the other hand, if he was very apprehensive about it, worried a great deal and so on, from an emotional standpoint his blood pressure might come up.

Q. You are not suggesting tuberculosis is a psychiatric thing now?

A. No. You asked me if tuberculosis would raise a person's blood pressure. If he were extremely apprehensive about his condition it may raise his blood pressure. The disease itself, as far as I know, would not cause any elevation in blood pressure.

Q. I thought you told me you told this man he had T.B.?

A. I did not tell him he had tuberculosis. I told him he had some physical findings and his chest X-ray was suggestive of tuberculosis. I advised him to seek medical care to determine if he did have tuberculosis and see if it was active. It was not my duty to make a diagnosis in his case.

(Testimony of Harold F. Edwards.)

Q. Doctor, will you tell us what his pulse rate was, for example, refreshing your memory. [311]

A. It is written down here, 80; and after exercise—I don't know what that is, 95 or 98 there.

Q. Is that within normal limitation?

A. That is right. And two minutes after exercise it was back to 80.

Q. That indicated, Doctor, a man in pretty good health, didn't it, that as a clinical finding in and of itself?

A. Well, that fact would be normal enough. That wouldn't give a total picture of him, certainly.

Q. Do you know what active tuberculosis does to a man's heart condition?

A. In some instances I do.

Q. Is it a stress and strain on the heart?

A. Tuberculosis—now, this is just generally speaking—any condition that will cause a fibrosis of the lungs, and tuberculosis is one of those conditions, will put a strain upon the right side of the heart because it is, just from the mechanical angle, more difficult to get the blood through the lungs for aeration. So in that respect tuberculosis could put a strain on the heart. Now, it doesn't do that in every case.

Q. Doctor, you brought some X-rays here. Do you claim to be a technical man that can look at these X-rays and read them and tell us this man has some tuberculosis?

A. His initial X-ray there was only suggestive of [312] tuberculosis.

(Testimony of Harold F. Edwards.)

Q. You are not answering my question. I am talking about you, Doctor.

A. Will you repeat your question?

Q. You are the only one I can cross-examine, and I want to know. I will repeat my question. I can't cross-examine anyone that isn't here.

Mr. Wilmer: He asked you to repeat the question, Mr. Palmquist.

Q. (By Mr. Palmquist): My question was: Can you, Doctor, take these X-rays and qualify here as a roentgenologist, experienced from a clinical standpoint, and from your technical standpoint and definitely point out to me on any of these X-rays a definite diagnosis of T.B.?

A. I did not make a definite diagnosis of tuberculosis. There were some findings there that were suggestive of tuberculosis.

Q. Doctor, will you answer my question. Can you qualify right here and now——

A. Can I look at those X-rays and say that is tuberculosis?

Q. I am asking you if you can qualify as a roentgenologist?

A. I am not a roentgenologist, no, sir.

Q. Capable of diagnosing from these X-rays——

The Court: He has answered your question.

Q. (By Mr. Palmquist): You cannot do it? [313]

Mr. Wilmer: He did not say that. He says he is not a roentgenologist. It does not mean the doctor can't look at X-rays and read them.

(Testimony of Harold F. Edwards.)

Q. (By Mr. Palmquist): Can you qualify as an expert that can definitely diagnose tuberculosis from these X-rays?

A. No, I can't diagnosis tuberculosis from those X-rays. I can say they are suggestive of tuberculosis, but I can't make a definite diagnosis.

Q. Counsel for the defense asked you a question here. He said, "Did this man ever tell you he had pneumonia? Did he ever tell you he had scar tissue?" And your answer was no, wasn't it?

A. That was before I saw that, part of my record there was he apparently told me he had pneumonia because I have a note here he had an old pneumonia.

Q. You would have never known he had this old pneumonia unless he told you?

A. Certainly, I asked him.

Q. Herbert Noah Sanders is the only man that could have told you that, isn't he?

A. Apparently so. He apparently did give me a history of old pneumonia there.

Q. What is pneumonia, Doctor?

A. It is a disease of the lungs.

Q. Is it one of those things you either die from or get [314] well from?

A. I guess you could say that.

Q. Sometimes when you get well from it it leaves some evidence and pretty definite evidence that it has been there?

A. Pneumonia doesn't always leave scars, it can.

Q. Can a bad case of pneumonia leave scars?

(Testimony of Harold F. Edwards.)

A. Yes. Pneumonia sometimes leaves scars, not always.

Q. Now, I notice as far as X-rays were concerned you said you sent him to X-ray men at the Base?

A. I sent his X-rays down to the radiologist, and the radiologist in turn requested further X-rays there, which are also there and you have the reading of Colonel Kellogg there who is the radiologist.

Mr. Palmquist: Thank you, Doctor.

Mr. Wilmer: We have no further questions.

(Witness excused.)

Mr. Palmquist: Could I ask the doctor one question?

Mr. Wilmer: Surely.

Q. (By Mr. Palmquist): There has been some question raised about No-Doz tablets, Your Honor. I will call him as my witness for that purpose if I can.

The Court: Go ahead.

Q. (By Mr. Palmquist): Are you familiar with No-Doz tablets?

A. Only in a cursory sort of way.

Q. They are a caffeine base, are they not? [315]

A. As I remember they are, yes, sir.

Q. A No-Doz tablet, Doctor, they are sold and say, "Keep alert safely, No-Doz awakeners," is that correct?

Mr. Wilmer: If it please the Court, counsel is going outside——

(Testimony of Harold F. Edwards.)

The Court: Objection sustained.

Q. (By Mr. Palmquist): Doctor, are there drug laws that govern the sale of matters of that kind to the public?

A. No-Doz is of course proprietary drug and apparently meets with laws governing it, otherwise they certainly wouldn't sell it over the counter as they do. I have never prescribed it.

Q. Doctor, as a matter of fact, I could empty this box right now and take all of these and come back here this afternoon and be alive and try this case, isn't that right? You want to make a bet on that?

A. I don't know whether you could or not. I couldn't answer that question.

The Court: That is all, Doctor. We will recess until 1:30.

(Whereupon, a recess was taken at 12 o'clock noon until 1:30 o'clock p.m.)

HAZEL CAMMACK

called as a witness herein, having been first duly sworn, [316] testified as follows:

Direct Examination

By Mr. Wilmer:

Q. Would you give us your full name for the Court and jury?

A. My name is Hazel Cammack.

Q. Where do you live?

(Testimony of Hazel Cammack.)

A. At Fairacres, New Mexico.

Q. Where is that in relation to the City of Las Cruces?

A. Four miles west.

Q. And what is your occupation there?

A. I manage the Picacho Court.

Q. That is what type of business?

A. They have apartments and overnight rentals.

Q. Did you manage that in 1954, in July of 1954?

A. Yes.

Q. Did you become acquainted, Mrs. Cammack, with a family by the name of Sanders, Herbert Noah Sanders and Delphia Sanders?

A. Yes.

Q. Were they tenants in the court?

A. Yes.

Q. How long did they remain there, Mrs. Cammack?

A. From June 28th to July 9th.

Q. During the time that they were tenants in the court, what type of a living accommodation did they have rented? [317]

A. They had two double beds in an apartment.

Q. Who stayed in the apartment?

A. The girls and mother.

Q. Where did Mr. Sanders sleep?

A. In his car.

Q. Did you offer to put a bed in the apartment for him to sleep in the apartment?

A. Yes, sir.

Q. What did he say?

A. He said he preferred his car.

Mr. Wilmer: That is all.

Mr. Palmquist: No questions.

Mr. Wilmer: May Mrs. Cammack be excused?

Mr. Palmquist: No objection.

(Witness excused.)

CHARLES CAMMACK

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. Will you tell us your name, please?

A. Charles Cammack.

Q. Your mother was the lady who just left the courtroom? A. Yes, sir.

Q. Where do you live, Charles? [318]

A. Las Cruces.

Q. What do you do there? You live with your parents, do you? A. Yes.

Q. What do your parents do?

A. They run a tourist court.

Q. And how far out of Las Cruces?

A. Two or three miles.

Q. In the summer of 1954 do you remember a man by the name of Mr. Sanders staying there?

A. Yes, sir.

Q. Did you get acquainted with him?

A. Yes, sir.

Q. How did you get acquainted with him, Charles? A. Just talking with him.

Q. Do you do any work around there or did you at that time do any work around the court?

(Testimony of Charles Cammack.)

A. Yes, sir, I was watching the service station.

Q. There is a service station?

A. There was one.

Q. At that time? A. Yes, sir.

Q. And you looked after it? A. Yes, sir.

Q. How did you happen to talk to Mr. Sanders? [319]

A. I don't know. He was just sitting out there with me and talking.

Q. Did he ever talk with you about what his habit was when he was taking a trip and how long he would drive? A. Well, he said——

Mr. Scoville: Just a moment. What was the question? May we have it read.

(The last question was read.)

Mr. Scoville: No objection to an answer of yes or no to that question.

Q. (By Mr. Wilmer): Did he ever tell you, Charles, what kind of hours he drove when he was on a trip? A. Yes, sir.

Q. What did he tell you?

Mr. Scoville: Objection, if Your Honor please, on the ground it falls within no exception of the hearsay rule that I know of as to habit or custom. I believe under the dead man's statute, so to speak, where death has sealed the lips of one of the parties then under the circumstances such statements are not admissible, such evidence is not admissible. We object to it on those grounds.

The Court: I don't think the dead man statute would be applicable to it.

(Testimony of Charles Cammack.)

Mr. Scoville: I have the further objection on the ground it is irrelevant, incompetent and immaterial. [320]

The Court: On that ground it will be sustained.

Mr. Wilmer: We would then like to make an offer of proof, if it please the Court, as to what the witness would testify to.

The Court: Very well. I will give you an opportunity to make it before we close the record.

Mr. Wilmer: Very well. With that we will excuse the witness.

Mr. Scoville: No questions.

LILY MUTCH

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. Will you tell the Court and jury your name, please, Madam?

A. My name is Mrs. Lily Mutch.

Q. Mrs. Lily Mutch? A. Yes.

Q. Will you tell us where you live?

A. Fairacres, New Mexico.

Q. That is outside of Las Cruces about four miles? A. Yes, sir.

Q. What is your business there?

A. I have a grocery store there. [321]

Q. Did you have a grocery store there in July of 1954? A. Yes, sir.

(Testimony of Lily Mutch.)

Q. Do you remember a man by the name of Sanders, Mr. Noah Sanders coming to your store?

A. Yes, sir.

Q. What was the purpose of his visit?

A. The purpose of his visit was to ask if I could give him credit a few days, until the found a post at White Sands Proving Ground, that he thought he might get the post.

Q. Did he tell you whether or not he had any money?

A. He told me he didn't have any money, but if he didn't get the job he would cash some bonds he had and pay me for the credit he got while trading with me.

Q. Did you give him credit? A. I did, sir.

Q. Did he use that credit to run up a bill?

A. Yes, sir.

Q. How much was the bill?

A. \$16.84, if I remember right.

Q. Did you know Mr. Sanders was going to leave Fairacres and leave the state?

A. No, sir.

Q. Did he pay you his bill before he left?

A. No, sir.

Q. Has it ever been paid to this day? [322]

A. No, sir.

Mr. Wilmer: That is all.

(Testimony of Lily Mutch.)

Cross-Examination

By Mr. Scoville:

Q. You know he was killed a very few days later in an automobile accident?

A. Yes, sir.

Mr. Scoville: That is all.

Redirect Examination

By Mr. Wilmer:

Q. Did you know he had \$2,400 with him when he asked you for credit? A. No, sir.

Mr. Wilmer: That is all.

Recross-Examination

By Mr. Scoville:

Q. Did you know it was his intention to return to New Mexico? A. To New Mexico?

Q. Yes. A. No, sir.

Q. Did you send a bill to his children?

A. No, sir, I didn't know where they were.

Mr. Scoville: That is all.

Mr. Wilmer: That is all. May Mrs. Mutch be excused? [323]

The Court: You may be excused.

(Witness excused.)

YOUNG VEAZEY

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. You have told us your name is Young Veazey, Senior, is that correct? A. Yes, sir.

Q. You live in Flagstaff? A. Yes, sir.

Q. What is your occupation there?

A. Well, I am a used car dealer and junk dealer.

Q. Do you have a wrecker?

A. Yes, sir, tow car business.

Q. In July, 1954, Mr. Veazey, what were you doing? A. I was with Caffey Auto Salvage.

Q. In Flag? A. Flag, yes, sir.

Q. On the morning of July 10th about 3 or thereabouts, did you have occasion to go with your wrecker to the scene of an accident about seven and one-half miles west of Flag on Highway 66?

A. Yes, sir. [324]

Q. You drove the wrecker? A. Yes, sir.

Q. When you got there, Mr. Veazey, did you observe a Hudson automobile which had been wrecked on the highway? A. Yes, sir.

Q. Do you remember where it was on the highway, did you make any specific measurements or anything like that at the time?

A. No, I didn't make any measurements any more than it was more or less on the north side.

Q. Did you observe the condition of the highway?

(Testimony of Young Veazey.)

A. I used the crane and lifted the front up, yes, and pulled it off the road.

Q. And it drug on the road as you drug it down the road. How far did you take it down the road? [327]

A. I would say as far as from here to the door over there.

Q. Didn't it drag on the road at that time?

A. They don't drag when you get them picked and on the front wheels.

Q. Didn't you attach a cable to it while the deceased was still in it and pull on it? A. Yes.

Q. Wouldn't that have affected the underneath of the car as it was flat on the road?

A. The car did not move when I taken the deceased out of it.

Q. You are not in the position to say the underside of the car was not changed, are you, between the time you first saw it and the time you got it to the garage and later lifted it up?

A. I am in a position to say we couldn't find no marks of any kind under the car.

Q. I am saying you don't know whether it was changed or not—there were no marks of any kind, is that your testimony?

A. No marks during the time.

Mr. Scoville: I have no further questions.

Mr. Wilmer: I think he has finished his cross-examination.

Mr. Scoville: You didn't object.

Mr. Wilmer: I didn't get a chance to. [328]

(Testimony of Young Veazey.)

Mr. Wilmer: Mr. Veazey, what I am getting at is, on the underside of that Hudson could you find where any metal, sharp metal of any kind had been brightened or had any foreign material like road material on it which would indicate it had gouged into or been in contact with the surface of the highway? A. No.

Mr. Wilmer: Cross-examine.

Cross-Examination

By Mr. Scoville:

Q. Mr. Veazey, I understood your testimony to say that the car was in the—in other words, nothing particularly happened to it between the time you picked it up and the time you got it over to the garage? A. Yes, sir.

Q. You know, Mr. Fronske, the photographer in Flagstaff? A. Yes, sir.

Q. Do you remember two or three days after this accident, the 12th or 13th, something like that, Mr. Fronske came over and took some pictures, do you happen to remember the occasion?

A. Yes, sir.

(Plaintiff's Exhibit 44 marked for identification.)

Q. I show you what has been marked Plaintiff's Exhibit 44 for identification. You recognize that as the Hudson, a picture of it taken at the garage there, isn't that right? [329] A. Yes, sir.

Q. And that is the way it looked, is it not? That

(Testimony of Young Veazey.)

is a fair and accurate reproduction of that vehicle, isn't that right, sir? A. Yes, sir.

Mr. Scoville: We offer Plaintiff's Exhibit 44 in evidence.

Mr. Wilmer: No objection.

The Court: It may be received.

(Plaintiff's Exhibit 44 marked in evidence.)

Q. (By Mr. Scoville): Referring to Plaintiff's Exhibit 44 in evidence, Mr. Veazey—I wonder would you mind stepping down just a step, Mr. Veazey. You might look at this. So the jurors can see it will you sort of stand this way. It is true, is it not, that the right front—rather the left front wheel, the rim shows that it has been bent and the tire has been knocked in such a position that that rim shows some evidences of being scraped, do you recall that? The rim scraped, where it had scraped on the pavement?

Mr. Wilmer: If he is asking the witness to interpret the picture——

Mr. Scoville: I am asking him if recalls that and using the picture to refresh his recollection as to the place I am pointing at.

Mr. Wilmer: Just a moment. I object to counsel [330] holding it up and asking the witness to interpret it. I have no objection to passing it to the jury and having them decide themselves what the picture shows.

Mr. Scoville: My point is, Your Honor, it is only a photograph after all.

The Court: May I have the question, please?

(Testimony of Young Veazey.)

Mr. Wilmer: I will withdraw the objection. Go ahead.

Q. (By Mr. Scoville): Do you recall this rim being bent and the tire being torn away from it?

A. I suppose so.

Q. Do you remember it, that is all?

A. Yes.

Q. I will show you a series of three——

The Court: May I see those?

Mr. Scoville: I don't believe they are in evidence.

The Court: No, but you had the same thing marked before.

Mr. Scoville: I am sorry. I recall they were identified but I couldn't get them in before.

Mr. Palmquist: By Mr. Fronske.

Mr. Scoville: May I withdraw those? What would be the most convenient way?

The Court: I think it would be easier, we already have so many pictures, if you would use the earlier ones.

Mr. Wilmer: If counsel would let me see them I probably [331] can stipulate to them.

The Court: I think they are 5, 6, 7 and 8, are they not?

Mr. Wilmer: We have no objection.

The Court: They may be received.

Mr. Scoville: They are Plaintiff's 5, 6, 7 and 8.

Mr. Palmquist: May we withdraw the others?

Mr. Wilmer: We have no objection.

(Testimony of Young Veazey.)

The Court: 45, 46, 47 and 48 for identification may be withdrawn.

Mr. Scoville: I will pass those to the jurors and have no questions about those.

Q. (By Mr. Scoville): Mr. Veazey, I believe I have only one other question. You made some examination of the personal contents of the Hudson automobile, some search of it, did you not?

A. Yes, sir.

A. And I believe you are the man who found \$2,400 in the suitcase in two wallets, is that correct?

A. Yes, sir.

Q. I believe you turned that money over to the authorities, is that correct?

A. Yes, sir.

Mr. Scoville: No further questions.

Mr. Wilmer: That is all. May Mr. Veazey be excused? [332]

Mr. Scoville: No objection.

The Court: You may be excused, Mr. Veazey.

(Witness excused.)

ROY H. BRYFOGLE

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. State your name?

A. Roy H. Bryfogle.

Q. What is your occupation?

(Testimony of Roy H. Bryfogle.)

A. Arizona Highway Patrolman.

Q. Where are you stationed?

A. Flagstaff.

Q. How long have you been there?

A. Going on four years.

Q. How long have you been a member of the Patrol? A. Four years, going on it.

Q. Have you had any experience as a police officer prior to that?

A. I have been a police officer about fifteen years all told.

Q. Roy, on the 10th of July last year did you have occasion to be called to the scene of a collision about seven and a half miles west of Flagstaff? [333] A. Yes, sir.

Q. Do you recall approximately when you received the call?

A. Around 3 a.m. in the morning.

Q. Where were you? A. I was home in bed.

Q. You went immediately, did you?

A. Yes, sir.

Q. Do you recall when you arrived?

A. Within ten minutes after receiving the telephone message.

Q. When you got there, Roy, what did you find?

A. I found a west bound passenger car and east bound semi had collided.

Q. Did you note the position of the two vehicles which had been in the collision at the time?

A. Yes, sir.

Q. What was the vehicle to the east?

(Testimony of Roy H. Bryfogle.)

A. The vehicle to the east was the semi. It was off on the north side of the road, had gone completely off the road in a northeasterly direction.

Q. And the other vehicle was where?

A. It was on the highway at an angle facing in a southwesterly direction.

Q. Now, where the Hudson, I believe it was, came to rest, was that in the vicinity of a macadam or asphalt patch in the [334] pavement?

A. Yes, sir.

Q. Do you recall approximately the area of that patch, that is, was it clear across the cement portion and how far east and west did it extend?

A. I would estimate it about thirty feet wide. It had completely covered the cement. The cement had cracked there and they had covered it with macadam. The cement was over the culvert.

Q. Did you find any foreign substances on the roadway when you arrived there, Roy?

A. What do you mean?

Q. I mean by that, oil grease, gasoline, anything of that nature?

A. I found a tremendous amount of Diesel oil, gasoline and other debris at the scene.

Q. Approximately from what point on the highway to what point did the Diesel oil, gasoline and other debris extend?

A. Oh, it covered about the entire area of the macadam. The road slopes a slight bit to the south so the oil and gasoline would run from where the

(Testimony of Roy H. Bryfogle.)

Hudson had been, or from the west bound lane, it would run across the east bound lane of traffic and over the shoulder.

Q. Were there any officers there by the time you arrived?

A. No, sir, I was the first one there I [335] believe.

Q. I presume your first care and consideration was for the occupants of the vehicles involved?

A. Yes, sir.

Q. Did you proceed at once to the Hudson?

A. I did.

Q. Did you ascertain there had been some people seriously injured? A. Yes, sir.

Q. What if anything did you then do?

A. Well, it was obvious that the driver of the vehicle was dead. His scalp had been pared back. The passenger to this right, female, she appeared to be dead, but the registered nurse at the scene said she felt a bit of pulse. And I had ordered the ambulance before I left Flagstaff and upon arrival of the ambulance we removed the female passenger into the ambulance and she was taken into Flagstaff.

Q. She was an adult? A. She was an adult.

Q. After that was done, Roy, what did you do?

A. I should say first when I got to the scene of the accident it had been reported the car had been afire. And also before I left Flagstaff I had ordered the fire department to send a truck out there and to douse the fire or if it were out to hose the area down to lessen the degree of fire hazard. The fire truck

(Testimony of Roy H. Bryfogle.)

drove up soon after I arrived [336] and I ordered the driver of the truck to hose the area down, whatever was necessary to cut through the gasoline and oil.

Q. Was there quite a bit of it there?

A. Quite a bit.

Q. You have spoken, Mr. Bryfogle, of debris. Did you notice where the debris was and how far it extended along the highway?

A. It was over quite an area, but I couldn't tell you exactly how far.

Q. Beginning with the Hudson car easterly, could you give us an idea how far it extended to the east, or do you remember?

A. There was no debris to the east of the Hudson—pardon me, no debris to the west. All the debris was to the east of the Hudson on the highway.

Q. Would you have any recollection as to how far it extended?

A. I couldn't give you any measurements on it, but it extended to the east of the macadam patch.

Q. Beyond the macadam patch?

A. Beyond the macadam patch.

Q. I don't remember whether I asked you or not, but with respect to this macadam patch, the east boundry and west boundry, where was the Hudson car located?

A. The Hudson was to the west of the macadam patch. [337]

Q. I believe you stated faced in a southwesterly direction?

A. Yes.

(Testimony of Roy H. Bryfogle.)

Q. You observed, I presume, extensive damage to the Hudson? A. It was a total loss, yes, sir.

Q. Prior to the time the highway had been hosed down, Roy, did you have any opportunity to make a careful examination of the surface of the highway? A. No, sir.

Q. Subsequent to the time when the highway had been hosed off or whatever you want to call it, did you make any examination?

A. Prior to it, no; after I did, yes.

Q. When did you make that examination?

A. Well, I made a cursory examination after the deceased had been removed from the vehicle. The coroner's jury came out. The coroner ordered the body removed and we removed the body. I made a visual check and ordered Mr. Veazey to remove the Hudson from the highway so we could flow traffic by.

Q. Tell me, Roy, what was the condition at that hour of the morning with respect to east and west bound traffic, was it heavy or light?

A. It was unusually heavy that night. [338]

Q. Did you at that time meet or talk to the driver of the truck that was involved?

A. I spoke to him very briefly.

Q. Did you notice his physical condition at the time?

A. He was in a mild state of shock I would say.

Q. How soon after the accident or how soon after you arrived did you talk to him, if you recall?

A. I don't recall.

(Testimony of Roy H. Bryfogle.)

Q. You did observe he was in a state of at least semi shock at the time? A. Yes, sir.

Q. Did you ask him what had occurred?

Mr. Palmquist: Immaterial, if your Honor, please, self serving.

The Court: He may answer this question.

A. Yes, I asked him what occurred.

Q. All right now. At the time when you questioned him, I believe you have stated it was there at the scene of the accident? A. Yes, sir.

Q. Had the coroner's jury arrived?

A. I don't believe they had arrived yet.

Q. The bodies or body at least was still in the car? A. Yes, sir.

Mr. Wilmer: We submit, your Honor, under the circumstances [339] it is part of the *res gestae*.

Mr. Palmquist: Self serving, if your Honor please.

Mr. Wilmer: If it please the Court, I believe the rule is of course discretionary, but where it has occurred the courts have held as much as thirty minutes to an hour.

Mr. Palmquist: It is clearly hearsay, if your Honor please.

The Court: There is an exception under the rule.

Mr. Palmquist: I know, but it is self serving.

Mr. Wilmer: If the man is in a state of shock in the presence of the accident as it existed, with the conditions unchanged, it seems to me it is for the jury to decide whether what he said at that

(Testimony of Roy H. Bryfogle.)

time is self serving or whether he was in fact speaking——

Mr. Palquist: The jury has heard him here, your Honor.

The Court: Proceed with the question. There is no question as yet.

Mr. Wilmer: I am sorry, your Honor.

Q. (By Mr. Wilmer): Will you tell us, Mr. Bryfogle, what Mr. Ripka told you at that time as to how the accident occurred?

Mr. Palmquist: We object to that, your Honor, on the ground it is self serving. [340]

The Court: Objection sustained.

Q. (By Mr. Wilmer): Did you observe whether or not Mr. Ripka had been injured?

A. I don't believe he was injured, no, sir.

Q. Did he stay there at the scene of the accident or go to the hospital?

A. No, sir, I sent him in in the ambulance.

Q. Roy, after the coroner's jury had arrived and viewed the body and the coroner had ordered the removal of the body and it was removed, then did you go about seeing about the other details of the accident? A. Yes, sir.

Q. Was the debris and other matter that was on the highway to the east of the Hudson removed from the highway? A. How was it?

Q. Was the debris, the clothing, the articles of property scattered along the highway, was that removed from the highway? A. Yes, sir.

Q. How soon, do you recall?

(Testimony of Roy H. Bryfogle.)

A. Well, there were bits of metal in the west bound lane of traffic. We had one lane of traffic open and these chunks of metal, I picked up some after I ascertained the condition of the occupants of the Hudson, I picked it up and either threwed it to to the north or the south of the [341] highway, whichever I was closest to. And after the coroner had decided to have the body removed I as well as other bystanders, I asked them to pick up the debris and let's get it off the road, and we did so.

Q. In other words, the highway was cleared up fairly quickly after the coroner had ordered the removal of the body? A. Yes, sir.

Q. Mr. Bryfogle, when did you begin or attempt to make a study of the accident or scene of the accident?

A. I made some fast measurements before the Hudson had been towed away from the position it came to rest at, with my tape.

Q. Yes. Then I believe you did take some pictures at the time?

A. Yes, sir, before it was removed.

Q. Those were flash pictures? A. Yes, sir.

Q. After the situation quieted down to where you could go to work on the details of the accident what did you do, what examination did you make?

A. Well, dawn was nearly breaking after I had the Hudson pulled over. I don't believe I did a darn thing, I went in to town.

Q. And the purpose of that?

(Testimony of Roy H. Bryfogle.)

A. I went in to question the female occupants. the [342] remaining occupants of the Hudson.

Q. Who did you talk to?

A. The eldest girl of the group.

Q. Did you ask her anything with respect to—I presume you went to ask her with respect to what she knew about the accident? A. Yes, sir.

Q. Did she tell you anything with respect to any sleeping tablets that were involved, rather No-Noz tablets?

Mr. Scoville: Is this impeachment?

Mr. Wilmer: Yes.

Mr. Scoville: His question must be in the proper form.

Mr. Palmquist: They weren't sleeping tablets. They were the opposite, No-Doz tablets.

Mr. Wilmer: I think we all understand that, if it please the Court.

Q. (By Mr. Wilmer): Mr. Bryfogle, I mis-spoke. Did you talk to the eldest girl, do you remember her name?

A. I would have to get my report out.

Q. Do you have your report?

A. Yes, sir. She was the eighteen and one half year old girl at the time, Norma Jean.

Q. I see. What did she tell you?

Mr. Scoville: I object to that on the ground it is not [343] the proper form for an impeaching question. The only reason it would be admissible would be for impeachment of this other witness and it is not the proper form.

(Testimony of Roy H. Bryfogle.)

Mr. Wilmer: I agree with counsel.

Q. (By Mr. Wilmer): Will you tell us, Mr. Bryfogle, at that time and place if this young lady told you her father had been taking No-Doz tablets?

Mr. Palmquist: If your Honor please, she has testified to that in this case.

Mr. Wilmer: She has denied that, your Honor, She stated her father bought some but she denied that she told Mr. Bryfogle he had been taking it.

The Court: I believe her testimony was that she didn't know whether he had been taking it.

Mr. Palmquist: That is right.

Mr. Wilmer: I asked the question, if it please the Court, if she had not told Mr. Bryfogle if she had not told Mr. Bryfogle that he had been taking them and she said not. I believe that is correct, your Honor.

The Court: All right.

Mr. Scoville: Withdraw the objection.

A. Yes, she did.

Q. You then went back to the accident, did you?

A. Yes, sir.

Q. What did you do then? [344]

A. I made my usual investigation, but prior to that I started going through the Hudson, looking for the evidence of these tablets.

Q. Did you find them? A. Yes, sir.

Q. What did it consist of?

A. A small metal box that had been severely bent in in some manner within the car after I imagine it made the collision.

(Testimony of Roy H. Bryfogle.)

Mr. Palmquist: Just a minute. Did you say metal box?

The Witness: Yes, sir.

Q. (By Mr. Wilmer): Do you still have that?

A. Yes, sir.

Q. Did you bring it with you?

A. I have, sir.

Q. This is in the same condition as when you removed it? A. Yes, sir.

(Defendants' Exhibit D marked for identification.)

Q. (By Mr. Wilmer): I hand you Defendants' Exhibit D, Mr. Bryfogle, and ask you if that is the box you found and which you have kept in your possession since? A. Yes, sir.

Mr. Wilmer: We offer it in evidence.

Mr. Palmquist: May I see it, counsel. Could I ask a question? [345]

The Court: Surely.

Q. (By Mr. Palmquist): Was this found in the car or the man's pocket?

A. As far as I remember it was found in the car.

Q. Didn't you write it down, Officer? You wrote everything else down?

Mr. Wilmer: That is not voir dire, if it please the Court.

Mr. Palmquist: He said as far as he remembered, your Honor.

The Court: This is voir dire.

Q. (By Mr. Palmquist): Yes. Well, have you

(Testimony of Roy H. Bryfogle.)

had this open? A. I looked in it before, yes, sir.

Q. You have had it open?

A. I opened it once.

Q. Were there more tablets in it than——

A. There was one tablet in it. That was the contents of it.

Mr. Palmquist: All right. We have no objection to this going in.

The Court: It may be received.

(Defendants' Exhibit D marked in evidence.)

Q. (By Mr. Wilmer): Now, Roy, did you then make a physical examination of the scene of the accident to determine what if any marks you might find at that time? A. Yes, sir. [346]

Q. What effect if any did you observe, if you did observe any, as to the effect on the pavement of the Diesel fuel, the gasoline and the action of the fire department in washing the pavement off?

Mr. Scoville: Objection, if your Honor please, as to his conclusions and as its effects. He can do the same thing we have been limited to, what he saw then and what he saw afterwards and so on, not his conclusion.

Mr. Wilmer: I am asking what he saw.

Mr. Scoville: You ask him what the effects were.

Mr. Wilmer: I asked him what effects did he observe.

Mr. Scoville: That is the same thing.

Mr. Wilmer: I am asking him to tell what he

(Testimony of Roy H. Bryfogle.)

saw if he saw anything. If he didn't see anything he can say so.

The Court: The witness may tell what he saw.

A. When I ordered the fire truck operator to hose the area down I watched what he was doing because I didn't wish to get sprayed with the substance he was using and I kept out of his reach, out of the area there and he was spreading the liquid substance on the pavement, scattering debris and everything else, cutting through the gasoline that was on the pavement.

Q. (By Mr. Wilmer): Did you observe whether or not he used a broom on the pavement?

A. No, after he stopped using the nozzle with the liquid in it I didn't pay a bit of attention to him. [347]

Q. Mr. Bryfogle, after you went back the next morning did you take some additional pictures?

A. Yes, sir.

Q. Did you at that time take pictures of any marks upon the pavement which you observed and which you attributed to the movement of the cars in the accident?

A. Yes, sir.

Q. Did you at that time or through the morning of that day come to a tentative conclusion as to the point of impact on the highway?

A. I did.

Q. Did you at a subsequent time change that opinion, Mr. Bryfogle?

A. I did.

Q. Now, when did you finally complete your investigation of the accident, if you recall? When did you finally figure you had done all you could do

(Testimony of Roy H. Bryfogle.)

to determine what the facts were insofar as the evidence showed there?

A. I investigated that accident, I should say, three or four days after the darned thing. At various times I would go out and look at the scene and re-examine it and re-examine it again.

Q. Did you on July 10th prepare and send in your report of the accident? A. Yes, sir. [348]

Q. Had you at that time completed your investigation of the accident?

A. Well, I had completed it as far as the report goes because I had to get that thing in within twenty-four hours, I am required to do it. I put down exactly what I had found but I had still not finished it.

Q. Will you tell us, Mr. Bryfogle, what your first impression or opinion was as to on what portion of the highway the impact had occurred?

A. The marks on the pavement indicated the truck was—may I look at my report?

Q. Sure.

A. A deep indentation in the highway on the west bound lane, which is north of the center line, five feet two inches north, had been caused by some metal digging into the macadam.

Q. And you tentatively concluded that was the point of the impact, is that correct?

A. Yes, sir.

Q. Now, from that point is that where you began your measurements to where the Hudson car

(Testimony of Roy H. Bryfogle.)

was when you say you made the quick measurements? A. Yes, sir.

(Defendants' Exhibit E marked for identification.)

Q. (By Mr. Wilmer): I am going to hand you Defendants' Exhibit E for identification. I am not sure whether this is [349] the right one or not, but will you examine it and tell me if that is the indentation you had reference to? A. Yes, sir.

Q. Would you take a pen if you have one and make an "X" on that, the indentation you have reference to.

A. I have a ball point; it won't make much impression.

(Witness marks on exhibit.)

Q. (By Mr. Wilmer): I am referring to Defendants' Exhibit E, the point you have marked "X," what you initially concluded was the point of impact. A. Yes, sir.

Q. From that point will you tell us where the Hudson was located on the pavement?

A. From that indentation on the pavement I measured forty-one feet to the left front of the Hudson.

Q. And in what direction? A. West.

Q. And that placed the Hudson car then off the west edge of the macadam patch, did it?

A. Yes, sir.

Q. And then from that point did you also sub-

(Testimony of Roy H. Bryfogle.)

sequently run measurements to the position of the truck? A. Correct.

Q. What distance did you find the truck had traveled from that point? [350]

A. The truck had traveled at an angle eighty-nine feet from the edge of the concrete from that indentation; and from the edge of the concrete it continued on one hundred one feet before it came to rest. That was to the left rear edge of the left rear duals of the semi where it had gone off the road on the north side.

Q. Roy, did you make an examination of the truck and of the undercarriage of the truck?

A. Yes, sir.

Q. Underside of it. When did you make that examination?

A. I made it that morning, made it the following morning.

Q. Did you observe what had occurred to the front wheels and axle of the truck? A. Yes, sir.

Q. What had occurred to them?

A. At some point in the collision the front axle had been broken loose so that it was at an angle to the nose of the truck. The wheels were shoved back under—the left front wheel would be shoved back under the cab.

Q. Had it been carried fully back under the tractor to the back drivers, if you remember?

A. Close to it, if I recall.

Q. Were you able to find on the undercarriage of the truck anything that indicated a gouging into

(Testimony of Roy H. Bryfogle.)

the pavement by the truck? [351] A. No, sir.

Q. Did you at a later time—I believe the following day—make yourself a personal investigation of the Hudson? A. Yes, sir.

Q. Were you able to find under the undercarriage of the Hudson any indication of a gouging of the pavement?

A. No, sir, except the left front wheel.

Q. And that consisted of what?

A. The tire obviously had blown and the flange of the wheel had worn down where it had made contact with the pavement of sorts.

Q. The flange had been worn down?

A. Yes, sir.

Q. You stated to us, Mr. Bryfogle, you subsequently came to a conclusion that your first impression was wrong. Will you tell us the physical facts that lead you to that conclusion?

A. Well, I changed my mind on this whole deal as I took what evidence I had found to the County Attorney's office to see whether I could get a complaint, explained to Mr. Mangum's assistant, Ted Flick what I had. He said I had absolutely no case, I couldn't corroborate what facts I had found. He refused me a complaint.

Q. That was Mr. Flick?

A. Mr. Flick. [352]

Q. Mr. Bryfogle, with respect—

Mr. Scoville: If your Honor please, I move the answer, the question and answer be stricken and the jury admonished to disregard it. Whether or not

(Testimony of Roy H. Bryfogle.)

the County Attorney thought this case would support a manslaughter charge or negligent homicide or not is wholly irrelevant to any issue in this case and the jury should be instructed to disregard it.

Mr. Palmquist: This is not a criminal case.

The Court: The jury will disregard the statement of the witness as to what the Deputy County Attorney told him.

Q. (By Mr. Wilmer): Mr. Bryfogle, later in careful examination of the pavement did you find any additional——

Mr. Scoville: Just a minute, Mr. Wilmer, before you answer. Go ahead and finish your question.

Q. (By Mr. Wilmer, continuing): Did you in the next day or two, I believe you have stated, made additional trips and additional investigation and examinations of the pavement.

Mr. Scoville: I will withhold the objection. Go ahead.

A. Yes, sir.

Q. Will you tell me, Mr. Bryfogle, whether or not on the southerly half of the pavement you found some skid or tire marks which you thought might or probably might be connected with the accident?

Mr. Palmquist: Just a moment, if your Honor please. The only thing I want to make certain on that is at what time, [353] what time. Something twenty-four hours later or two or three days later that then shows up on the southerly edge is different——

Mr. Wilmer: If the answer to that is he did I will ask him when.

(Testimony of Roy H. Bryfogle.)

Mr. Palmquist: No, but my objection to the question, your Honor, it was too broad. He could have been out there the other day.

The Court: Counsel says if he answers that he did he is going to ask him when.

Mr. Palmquist: Fine.

A. I didn't find those marks, they were pointed out to me by another party.

Q. Who was that? A. Roy Wacker.

Q. Was Mr. Dale Slocum there with you at the time? A. I don't recall.

Q. What type of tire marks were those?

A. They were impressions on the pavement where some heavy vehicle had had its brakes set instantly.

Q. Where were they with respect—this was when now?

A. I couldn't tell you, the next day or two.

Q. Within the next day or two? A. Yes, sir.

Mr. Palmquist: Just a moment. Did I understand that [354] answer correctly, within the next day or two?

The Witness: I couldn't say exactly when, no sir.

Mr. Palmquist: I wanted to understand your answer.

Mr. Wilmer: His answer was it was within the next day or two. It was very clear.

Mr. Palmquist: All right, fine.

Q. (By Mr. Wilmer): You did examine them, did you? A. Yes, sir.

Q. Did their position and existence on the highway have anything to do with your feeling with

(Testimony of Roy H. Bryfogle.)

respect to where the point of impact would be and might have been?

Mr. Scoville: Objected to. We are not interested in his feelings, we are interested in what he saw and what was there, not in whether it changed his feelings about it.

Mr. Wilmer: I mean his opinion.

Mr. Scoville: Or his opinion for that matter. That is the ultimate question.

The Court: Counsel has permitted him to give his opinion earlier. The time for your objection on the statement of his opinion was when——

Mr. Scoville: All right, if that is open now that is fine.

Mr. Palmquist: We are relying on this police report. Go ahead.

Q. (By Mr. Wilmer): Tell me, Roy, since that is the [355] situation do you have your report you made? A. Yes, sir, I have a copy of it.

Q. Would you let me have it, please. Is this the complete report?

A. That is part of it. This is the rest of it.

Mr. Wilmer: We ask this be marked for identification and offer it in evidence.

Mr. Palmquist: Can we see it?

Mr. Wilmer: Surely.

Mr. Palmquist: Is this the original report?

The Witness: It is a photostatic copy.

Mr. Palmquist: Where is the original?

The Witness: Still in the Phoenix office.

(Testimony of Roy H. Bryfogle.)

(Defendants' Exhibit F marked for identification.)

Q. (By Mr. Wilmer): Is Defendants' Exhibit F for identification a true carbon copy of the original report you filed as of July 10th?

A. Yes, sir.

The Court: You said carbon copy.

Mr. Wilmer: One is carbon and portion is photostat, your Honor.

Mr. Palmquist: We submit, if your Honor please, we have a photostat furnished to us by the Arizona Highway Patrol. We have no objection to the true report going in and here is the full and true report, counsel. We will stipulate [356] to that all going in. It is furnished to us. But this doesn't look like that.

Q. (By Mr. Wilmer): Will you examine this, please, Roy, and tell me what if anything in that is not a part of this matter that you handed me?

Mr. Palmquist: If your Honor please, those documents speak for themselves.

Mr. Wilmer: I am asking the witness if he can tell me he manifestly knows there is something in there that should be in here.

Mr. Palmquist: That is something for the jury to decide.

The Court: I will let the witness answer if there is anything in the papers he has that is not included in the Exhibit F for identification.

(Testimony of Roy H. Bryfogle.)

The Witness: It is the same as the one I have there. I got it from the same copy, my original.

Mr. Palmquist: Would you mind using our copy, counsel?

Mr. Wilmer: No, I will use the one I know is correct. If you want to point out where it is incorrect.

Mr. Palmquist: I will point out several. Will you come here, counsel. Those two pages are there; where are the rest of these pages? And where is this page? Then where is this page? Where is this writing here?

Mr. Wilmer: Here it is. [357]

Mr. Palmquist: Is that it?

Mr. Wilmer: That is right.

Mr. Palmquist: Where is this part?

Q. (By Mr. Wilmer): Roy, this instrument here which is headed "Arizona Highway Patrol fatality sheet," was that part of your report that you made July 10th?

A. I gave this to the County Attorney and coroner.

Q. That is not part of this? A. No, sir.

Q. That is not part of your report?

A. No, sir.

Mr. Palmquist: If your Honor please, that came from the highway Patrol.

The Witness: One report is sent in——

(Testimony of Roy H. Bryfogle.)

The Court: That is counsel's statement. I don't know anything about it.

Mr. Wilmer: May I see if I can clarify it. I don't think it makes too much difference, your Honor. I have no objection to including in it the sheet which is the additional fatality report and I will ask Mr. Bryfogle if this is correct. If it is correct we will agree it is correct and dispense with any formality in proving it.

The Witness: Yes, sir, that is my report.

Mr. Palmquist: May I see those reports, counsel. Counsel, if you say they are the same—— [358]

Mr. Wilmer: The only thing is there is the additional report of yours which is the fatality report.

Mr. Palmquist: Your Honor has ruled on certain of these things as to statements the truck driver made. This contains some statements as to what the truck driver said. We object to that portion of the report.

Mr. Wilmer: If the report is admissible it is admissible as a whole as part of his report. We offered it because counsel said he was relying on it.

Mr. Palmquist: We will let it all in when you exclude the improper part.

The Court: Counsel has offered it as a whole and says he withdraws it if you gentlemen object to it.

Mr. Palmquist: We maintain our objection.

Mr. Wilmer: Very well. Then I ask permission to withdraw it.

The Court: Very well.

(Testimony of Roy H. Bryfogle.)

Mr. Palmquist: All right.

Mr. Wilmer: Then you can complete it without me coming [361] back. Would you mark those three for me, please?

(Defendants' Exhibit G marked for identification.)

Q. (By Mr. Wilmer): Handing you an exhibit which is Defendants' Exhibit G, consisting of three pictures, will you tell me, please, Mr. Bryfogle, if you examined the two-wheel utility trailer?

A. Yes, sir.

Q. I believe that the box had been broken off and the stuff all scattered? A. Yes, sir.

Q. Did you make any examination particularly with respect to the tires on that? A. Yes, sir.

Q. I hand you this exhibit and ask you to look at the three pictures and ask you if they correctly represent the condition of the tires of the trailer and the physical damage which you observed to the tires?

A. Yes, sir, that is the utility trailer and the tires.

Q. With respect to the second picture, which is that of the utility trailer, when you viewed it after the accident had the tongue been bent and twisted in the direction which it appears there?

A. That is the way we found it, yes, sir.

Mr. Wilmer: We offer G in evidence.

Mr. Palmquist: May I see it. I will stipulate these [362] may be admitted.

(Testimony of Roy H. Bryfogle.)

The Court: They may be received.

(Defendants' Exhibit G marked in evidence.)

Mr. Wilmer: Cross-examine.

Cross-Examination

(Continued)

By Mr. Palmquist:

Q. Mr. Bryfogle, you have no interest in this case, do you? A. None whatsoever.

Q. I asked you a question, I said when you went out to the scene of this accident, did you call for a Mr. Wacker?

A. Called for an insurance adjuster.

Q. Did you call for Mr. Wacker?

A. I called for the Arizona Insurance Adjusting Agency.

Q. You didn't send out any call for the agency that protects dead and injured people?

Mr. Wilmer: We object to the question as being improper.

The Court: Objection sustained.

Q. (By Mr. Palmquist): You called for the Arizona—what was this again?

Mr. Wilmer: If it please the Court, we object on the ground it is immaterial and of no consequence in this matter.

Mr. Palmquist: I think this goes right to the motives, if your Honor please.

Mr. Wilmer: Very well, we will withdraw the

(Testimony of Roy H. Bryfogle.)

objection [363] if counsel feels that way. Go right ahead.

Q. (By Mr. Palmquist): What was this party you called for?

A. Called for Arizona Adjustment Agency. I called for an adjustment agency every time I have a bad accident.

Q. Does the Highway Patrol—is that the law of the state of Arizona:

A. It is a custom we use here.

Q. Oh, a custom? A. Yes.

A. You mean that is how you treat injured people in this state?

Mr. Wilmer: Object to as being improper cross-examination.

Mr. Palmquist: I will withdraw the question.

Q. (By Mr. Palmquist): All right, did a man in response to that call come out there?

A. Yes, sir.

Q. Who was it? A. Roy Wacker.

Q. Did you know Roy Wacker?

A. I have known him for a number of years.

Q. A good friend of yours?

A. He is just a business acquaintance.

Q. Does he take care of you at Christmas time?

A. I don't know Mr. Wacker socially at all.

Q. Will you answer my question?

A. Nobody takes care of me at all. [364]

Q. What does he do for you at Christmas time?

A. He doesn't do anything for me.

Q. What did he do for you concerning this ac-

(Testimony of Roy H. Bryfogle.)

ident? A. Not a thing.

Q. Didn't he hold the end of the tape for you?

A. He assisted me in my investigation.

Q. And as a matter of fact, he has been assisting you in this investigation ever since that night, hasn't he?

A. Both sides have been assisting me.

Q. Who have you seen from our side of the case? Have I ever talked to you?

A. Never saw you before.

Q. All right. You were having an argument with Mr. Wacker out there this very noon, weren't you?

A. I haven't had an argument with anybody.

Q. Let's go back to your original conclusion and the conclusion you now say you have. Would you step down here. You testified that you measured some marks, and I think we have got a picture of those marks, the picture taken by you. Then I have Plaintiff's 19. It is a large blow-up. Do you recognize this picture? A. Yes, sir.

The Court: Is that 19?

Mr. Wilmer: 19-A.

The Court: One of them is in evidence and one isn't.

Mr. Palmquist: I will get this in evidence now.

Q. You also recognize Plaintiff's 37 as a blow-up of the same view, do you not? [365]

A. Yes, sir.

Q. Those are your pictures, aren't they?

A. Yes, sir.

Q. That is what you saw out there when the sun

(Testimony of Roy H. Bryfogle.)

came up so you could really see things the morning of that accident when you were taking pictures?

A. Yes, sir.

Q. You saw Glen Flake here the other morning, he came down from Snowflake to testify?

A. Yes, sir.

Q. You have been down here ever since, haven't you?

A. Yes, sir.

Q. Mr. Flake told us he had protected the north side of this lane where these marks are until you came back with your camera; when you came back with your camera was he still there?

A. I had my camera with me all the time.

Q. Did you go into town? You said you went in with some injured people or something?

A. I went in to question the other parties.

Q. You came back and that is when you took these pictures?

A. Yes, sir.

Q. And this is a true and correct representation, this Plaintiff's 37 for identification?

A. Yes, sir. [366]

Mr. Palmquist: We offer it in evidence at this time.

Mr. Wilmer: If it please the Court, counsel the other day stated that was a darker exposure of this same picture.

Mr. Palmquist: He took it——

Mr. Wilmer: Just a moment. Counsel made this statement that this is a darker exposure for the purpose of obliterating or cutting out certain marks from the scene.

(Testimony of Roy H. Bryfogle.)

Mr. Palmquist: That is not so. Do you want to take the stand and be sworn?

Mr. Wilmer: I ask the Court to examine as to equal clearness an equal sharpness. I will withdraw the objection. I think the jury can look at both of them.

Mr. Palmquist: This man said he took both pictures.

Mr. Wilmer: He didn't take the enlargements. We have no objection.

The Court: 37 may be received.

(Plaintiff's Exhibit number 37 marked in evidence.)

Q. (By Mr. Palmquist): Now, I would like to have you step down here. The scale of this map is one inch equals three feet. Here is that culvert, here is the western edge of the black top, here is the eastern edge. And just disregard all marks that are on there. We have even put in these guideposts for you. I would like to have you draw in the marks you were trying to photograph that you said led up to the truck. Will you do that? [367]

A. May I have my report, please?

Q. I don't have your report.

(Document handed to witness.)

Q. (By Mr. Palmquist): You said they began five feet, two inches north. Here is the scale north of the white center line. Here is five feet right there.

(Testimony of Roy H. Bryfogle.)

Mr. Scoville: That is already to scale. I mean by that, that isn't inches.

Q. (By Mr. Palmquist): Perhaps we should start with some point. Do you know where the truck was for sure when the accident happened?

A. Yes, sir, where it came to rest.

Q. Yes. That is where you made your measurements, was to the left rear duals, wasn't it?

A. You mean where it came to rest?

Q. Yes. In fact, your measurements went up to the left rear duals or right rear? A. Left rear.

Q. That is one you can count the guideposts on there. Let's locate that truck first, then measure backwards.

A. Let me ask you a question. This guidepost is counted in on the three, or this one here?

Q. I don't know which one you are talking about.

A. I don't either. Just about where my car is parked, to the right of the front circle. [368]

Q. Yes.

A. Is that this one here? It couldn't be.

Q. That is right.

A. This is incorrect here. It should be taken on down. Should be over here somewhere.

Q. All right. Those marks started in this black patch, didn't they?

A. They started about in here. You mean the tire marks?

Q. Yes. As a matter of fact, you took a picture of some of those marks, didn't you? A. Right.

Q. Is this a picture of it?

(Testimony of Roy H. Bryfogle.)

A. Are those clear? Show me the original.

Q. This is the original, is it not?

A. That is right. That is the mark——

Q. That is the mark that is five feet, two inches?

A. No. The mark five feet, two inches isn't shown on those. That is the indentation shown on the macadam.

Q. This is a fresh mark?

A. These were fresh marks.

Q. Were these as fresh as fresh can be?

A. It happened some time during the collision.

Q. No question about it? A. No question.

Q. In fact, the asphalt, when you looked carefully the [369] asphalt was rolled up to the east end of that mark?

Mr. Wilmer: I don't like to interrupt, but our record—I have no objection to the scene, but I would like to have it marked.

Mr. Palmquist: Do you have any objection to this going into evidence?

Mr. Wilmer: None in the slightest.

(Plaintiff's Exhibit 45 marked in evidence.)

Mr. Palmquist: Will you go ahead and be drawing those marks?

A. Which ones do you want?

Q. The ones you said were made by the truck, eighty-nine feet to the edge of the pavement; one hundred-some feet off the pavement.

A. I can't because it isn't wide enough here.

Q. Run it as far as the map goes.

(Testimony of Roy H. Bryfogle.)

This green mark here wasn't on there, was it? That was just a mark you made?

A. That is to identify where I am starting from.

Q. Will you put an arrow on that so we won't have any confusion.

The Court: I understand, counsel, you have a picture.

Mr. Palmquist: Yes, we do have one here.

The Court: What is it?

Mr. Palmquist: Plaintiff's 28. [370]

The Court: 49 for identification will be withdrawn.

Q. (By Mr. Palmquist): Show them like they were made by a dual wheel, as you see them in these photos.

A. That is the best I can do for you.

Q. Will you put those in on the right, too. You know what the tread of the truck was, don't you?

A. What do you mean?

Q. The tread of the truck was eight feet, wasn't it, center of wheel to center of wheel?

A. If you say so. I didn't measure it.

Q. Make a parallel line as indicated in these photographs. A. From the inside to the inside?

Q. That is outside to outside. That would be about seven feet from the outside dual to outside dual.

Wait a minute, where is that Plaintiff's 19? None of those marks were south of that center line, were they, Officer?

(Testimony of Roy H. Bryfogle.)

A. According to your eight feet it gets down here.

Q. When you saw them out there they weren't, were they?

A. I never measured the beginning of the tracks. I measured the indentation in the concrete; it went from here.

Q. Was that the right rear dual or left rear dual that you measured? That is what I am trying to find out. Will you look at your report?

A. I measured from the indentation to the left rear dual. [371]

Q. Will you show me where that shows on your report?

Mr. Wilmer: The report has been excluded from evidence, I believe.

The Court: The report is not in evidence.

Mr. Palmquist: He said he had refreshed his memory, if your Honor please.

A. One hundred one feet to edge of concrete from left rear duals.

The Court: Just a moment. It is impossible for the reporter to follow anything like this. You have your back turned and walk around the room. Nobody could take that.

The Witness: The indentation, eighty-nine feet to the edge of concrete; one hundred one feet from edge of concrete to left rear duals.

Q. (By Mr. Palmquist): While you are here, Plaintiff's Exhibit 28, do you have that? This mark here now——

(Testimony of Roy H. Bryfogle.)

Mr. Wilmer: Please. I object. He says, "This mark here." Can you give us something to have on the record?

Mr. Palmquist: I started to before I was interrupted. I will repeat it. Plaintiff's Exhibit 28, this mark here, being the edge, the easterly edge of the asphalt mark, that is correct, isn't it? You notice the contour of that?

A. Yes. That is the easterly edge.

Q. Right there, I am going to make an arrow pointing to it, is the mark which was a very clean, very fresh mark, right? [372]

A. Right.

Q. We will call that arrow "A." And right here, looking closely, you see at the end of arrow "B" the rolled-up portion of some asphalt caused by an object moving in which direction?

A. Easterly.

Q. Easterly. No question about it?

A. No question.

Q. In other words, the thing that made this mark here had to be going easterly, which is like arrow "C," right?

A. Correct.

Q. So that these marks weren't made by something going westerly, but going easterly, right?

A. Right.

Q. Right here was another one of those marks, arrow pointing, we will call that arrow "D," right?

A. Right.

Q. That was really clean, no doubt about that being fresh, was there, Officer?

A. It was right down in the concrete, fresh.

(Testimony of Roy H. Bryfogle.)

Q. Down at the end of this was one of these rolled-up tufts of this asphalt?

A. Yes. Not as noticeable as your "B."

Q. There is no question but what that was made by either a car or trailer being shoved in an easterly direction, was there? [373]

A. Something went east.

Q. Something went east. All right.

(Exhibit handed to jury.)

Q. (By Mr. Palmquist): This is something else that went east, this truck and trailer on Plaintiff's Exhibit Number 32, that stopped where I have made arrow "A," on it, right? A. Right.

Q. Those dual marks shown here by arrow "B" and also by arrow "C" here lead right into the duals of that trailer, isn't that correct? A. Correct.

(Exhibit handed to jury.)

Q. (By Mr. Palmquist): And here on Plaintiff's Exhibit Number 25, this again is the same trailer, right? A. Right.

Q. And here are those same duals, you can see them coming right down the highway, can't you, as you have drawn in these marks? A. Right.

(Exhibit handed to jury.)

Q. And the marks the jury are now looking at on Plaintiff's Exhibit 28, here again you can see that indentation, can't you? A. Yes, sir.

Q. You notice we have two types of arrows,

(Testimony of Roy H. Bryfogle.)

“R-2” arrows and “R-1” arrows. You see the “R-1” arrows mean the tracks [374] that lead to the truck. You have to stand back just a little bit to see that. Do you see that?

A. I see what you are getting at.

Q. The marks made as indicated by the “R-1” arrows were made by different type tires than were made by the “R-2” arrows, right? No question about that? A. Yes, they cross over here.

Q. No question about that, is there? These “R-2” marks were not made by the dual wheels of that truck or tractor trailer, were they? A. No.

Q. The only other vehicle involved in this accident was a Hudson car with a two-wheel trailer, right? A. Right.

Q. If you hold this back so you get the view you can see that all there very clearly on Plaintiff's Exhibit 19-A, as you saw it that day, and that was why you took this photograph, wasn't it, Officer?

A. What is on there, that is what I took, yes.

Q. Yes. And that same thing can be seen here if you hold it out, you can see those same marks on there and those weren't really skid marks, were they, Officer, they were more friction marks, the wheels are turning but not turning fast enough and still leave a—what do you call that rubber [375] mark? A. Traction.

Q. Yes.

A. From here on in these, I know nothing about these here, but from the edge of the macadam directly to the truck, these marks were left by the rear

(Testimony of Roy H. Bryfogle.)

duals when the brakes had been set. He had a device on the truck similar to a railroad, you can break your air line and they lock. Due to his weight he went forward.

Q. That is the only time the brakes got on?

A. I don't know when he put his brakes on.

Q. You know this, the Hudson never got its brakes on? A. No indication of it.

Q. No indication at all. And no indication the truck ever got its brakes on?

A. That evidence disappeared, if there was any.

Q. Do you remember there was quite some difficulty in getting the dead man out of the car?

A. Some difficulty, yes, sir.

Q. In fact, you had to get a cable from Mr. Vincenzes' car and attach it to the post and drag that car away before you got him out?

A. Whose car?

Q. The Hudson.

A. We got a cable, hooked on the wrecker and pulled it away—Veazey, you mean? [376]

Q. Yes. Before you had Veazey do that, that was why you took a picture, so there would never be any question as to the location of that car, isn't that correct? In fact, you took two different pictures, did you not? I will show them to you, they are in evidence, Plaintiff's Exhibit 16 and Plaintiff's 15. Before you ever had the cable on that car and pulled it you took some pictures?

A. That is right; I took two shots of it.

(Testimony of Roy H. Bryfogle.)

Q. So there would never be any question as to where the car was pulled to?

A. This is before the car was moved.

Q. Yes. And that was before the dead man was taken out?

A. Correct. I took two pictures. I was afraid one might not turn out. That is why I took them.

Q. If you look underneath that car and you compare that with Plaintiff's Exhibit 28, which the jury is now looking at, which are the marks here? Let's just hold these up there, if you will. Hold the top, Plaintiff's 28, and I will hold these bottom ones. You place this edge of this asphalt up here?

A. Yes.

Q. We have another picture in evidence. Hold this one, too. You can see this part right there, can't you?

A. Right.

Q. And this part is right here where it quits, isn't it? [377]

A. Right.

Q. Then following on over, you see how this comes in here, goes out——

Mr. Wilmer: If it please the Court, I am going to object——

The Court: Objection sustained.

Mr. Wilmer: I object again to counsel asking the witness to interpret the pictures. We have twelve men here capable of interpreting the pictures.

Mr. Palmquist: I am asking him to refresh his memory.

Mr. Wilmer: That is not asking him to refresh his memory.

(Testimony of Roy H. Bryfogle.)

Q. (By Mr. Palmquist): I will ask you, Officer, if this doesn't refresh your memory, that the car was here exactly where Mr. Wedgeworth and Mr. Cook and other witnesses have placed it, with its left front just over this edge of this asphalt with its rear end sticking out?

A. You mean to the east of the macadam?

Q. Yes. A. No.

Q. Of course when you took your pictures it had been dragged down here? A. Oh, no.

Q. Except for these two pictures, these are the only two pictures you took before it was moved, isn't that correct? [278]

A. That is right. No, your car came to rest over here.

Q. Wasn't the car pointing in a westerly direction? A. Southwesterly.

Q. Southwesterly. And the way I am indicating it, the bottom of these pictures is southwesterly?

A. Yes.

Q. All right. You may be seated.

Mr. Palmquist: I would like to have the gentlemen of the jury look at these four. If your Honor please, counsel offered me a picture here that he had the witness make a mark; it to be photo number 02876, by Dale L. Slocum——

The Court: Is that E for identification?

Mr. Palmquist: It is Defendants' Exhibit E for identification. I will offer this as my exhibit.

Mr. Wilmer: I should have offered it. I thought I had.

(Testimony of Roy H. Bryfogle.)

Mr. Palmquist: I will accept counsel's statement as to when this was taken. Can you tell me the date?

Mr. Wilmer: Look on the back of it, I think it shows.

Mr. Palmquist: No, it doesn't.

Mr. Wilmer: It was either the 12th——

The Court: Do you want to offer it, Mr. Wilmer?

Mr. Wilmer: Yes, I will offer it.

The Court: It may be received as E in evidence.

(Defendants' Exhibit E marked in [379] evidence.)

Mr. Palmquist: Counsel has shown you a picture and with some difficulty with the pen, and you see that "X" on there, you made an "X" as an indentation on the highway? A. Yes.

Q. That is on the north side of the white line, is it not? A. Yes, sir.

Q. You said that was the indentation which you thought to be the point of impact?

A. Yes, sir.

Q. Which is five feet, two inches north of the north white line, is that right? A. Right.

Q. And which side of the road is that for which driver?

A. That is in the westbound lane of traffic.

Q. For people going to California, like Mr. Sanders? A. Yes, sir.

Q. That would have been Mr. Sanders. What portion of his car would be at that point of impact?

(Testimony of Roy H. Bryfogle.)

A. I don't know. I don't know what caused that.

Q. It would be the left front corner of his car, would it not? A. I don't know.

Q. There was no doubt in your mind the day you conducted this investigation, was there? [380]

A. The day I conducted that investigation, in my coroner's report, I said I had not completed it.

Q. You said that today. Did you say that at the coroner's inquest?

A. I believe it is in the inquest.

Q. Let's read the inquest. I call your attention to page 7. Let's go through from the very beginning, your testimony, you read with me.

Mr. Wilmer: If it please the Court, we object to counsel reading. We have no objection to having the witness examine it and if he finds any statement to the effect that he hadn't completed it, but reading the whole inquest is certainly improper.

The Court: The impeachment part of the document is the part——

Mr. Palmquist: All right.

Q. (By Mr. Palmquist): Do you remember testifying at the coroner's inquest? A. Yes, sir.

Q. The question was asked of you—you told them that Roy Wacker held the tape for you, did you not? A. Yes, sir.

Q. And do you remember, you said: "Will you give to the coroner and jury the results of your observations and measurements?" Answer: "As near as I can"—— [381]

Mr. Wilmer: Just a moment. This is not im-

(Testimony of Roy H. Bryfogle.)

peachment. I don't know what basis counsel is attempting to do this.

The Court: Let's get to the impeachment questions, if there are any.

Mr. Scoville: The problem here is this. The witness has said that he was uncertain and indefinite. We would like to offer the whole of this very short testimony at the inquest to show there was no indefiniteness, no uncertainty, positive, direct testimony and conclusions, on not only one day but two on the 10th and when the inquest was completed three days later on the 13th. When he said he was uncertain and indefinite we think this is impeaching. The only way you can do is offer it all.

The Court: I will have to read it.

Mr. Palmquist: Very well.

The Court: Gentlemen, at this time we will recess for about ten minutes.

(Recess.)

The Court: I have read the coroner's inquest transcript that counsel handed me. I will not permit the reading of the transcript by way of impeachment.

Mr. Palmquist: No portion of it, you mean, your Honor?

The Court: I will require you to proceed as you do on impeachment. I am not going to permit it at this time.

Mr. Palmquist: Will you hand the officer the transcript? [382]

(Testimony of Roy H. Bryfogle.)

Q. (By Mr. Palmquist): Officer, I call your attention to page 7, to the answer you gave, starting with line 3 and ending on line 7.

You have read that? A. Yes.

Q. I will ask you whether or not that answer was given in response, talking about the indentations on the highway at the point of impact we have been looking at in these photographs?

A. I assume that is what caused it.

Q. I will ask you whether or not on July 10th, 1954, the very day of this accident, in response to this question asked by the coroner before the coroner's jury and at the coroner's inquest:

"Q. Did you observe any abrasions or wearing that would indicate any indentations caused by the Hudson?

"A. Not as yet, no, sir. The left front tire of vehicle number 2 was demolished."

That vehicle number 2 was which car?

A. The Hudson.

Q. "The left front tire of vehicle number 2 was demolished. It blew out and the rim of this left wheel was bent, flattened out in places. That, I assume, caused the indentations in the highway."

Did you give that answer? [383]

A. Yes, sir.

Q. Was that a true answer?

A. That is what I thought at the time.

Q. Then I ask you to look on page 9 where Mr. Dryden, a juror, asked you a question, starting with

(Testimony of Roy H. Bryfogle.)

line 10 and going on down to line 19. You finished that? A. Yes.

Q. I will ask you whether or not these questions were asked——

Mr. Wilmer: Just a minute, if it please the Court, this is not impeachment. The witness testified that his initial opinion and impression was just what he was testifying at the coroner's jury. If I understood, the purpose of this was to see if some place in here he said he hadn't completed his investigation. He hasn't denied he originally so thought and testified.

Mr. Palmquist: This is impeachment and cross-examination, if your Honor please.

The Court: Impeachment of what, sir?

Mr. Scoville: We haven't been able to ask this question yet.

The Court: I have read the transcript and the witness in several places in there says: As far as I have been able to ascertain, or, in my best opinion in matters such as this.

Mr. Palmquist: He doesn't say that in this instance. [384]

The Court: No, but you have got to take the thing as a whole. This started out to be a question if he didn't express himself at the inquest as having a positive, firm, fixed opinion about the accident, unchangeable opinion. I have read the transcript and to expedite things I will say to counsel that I can't find that in there.

Mr. Palmquist: We will point it out to your

(Testimony of Roy H. Bryfogle.)

Honor and this is one of the places we will point it out right now: Page 9, line 12, one of the jurors asked the question. That is a matter of the weight of the evidence, your Honor. That is for this jury to determine. Page 9, starting with line 10 down to line 19.

The Court: The difficulty with that, counsel, is if you will turn back to page 6——

Mr. Palmquist: We offered to read it all. I will renew my offer. Perhaps counsel will stipulate. Will you stipulate to this whole transcript going in?

The Court: If you will let me finish, please. If you turn back to page 6 of the transcript, it is obvious the witness is stating only an opinion where the cars were with reference to the white line. I am not going to permit you to read page 9 when I know that page 6 will put a very different aspect on the contents of page 9.

Mr. Palmquist: In view of your Honor's remarks before this jury, comments, I feel, that now we are entitled to have [385] this whole transcript read to this jury.

The Court: I have expressed myself on the matter that is before the Court at this time.

Mr. Palmquist: I know, but it goes to the very weight of all of this now. And we feel very earnestly, in view of your Honor's remarks, it must be read to this jury so they can use their own judgment.

The Court: The Court has ruled on whether it will be or not.

(Testimony of Roy H. Bryfogle.)

Mr. Palmquist: I will offer it through the Court, to stipulate with counsel that this whole transcript be read.

Mr. Wilmer: It appears to me, if it please the Court, that counsel is simply playing fast with the Court. He has ruled. He knows I am not going to stipulate. We ask he proceed with the examination.

The Court: Let's proceed.

Mr. Palmquist: Very well.

Q. (By Mr. Palmquist): Isn't it true that on the 10th of July, right after you investigated that accident, there was no doubt in your mind and you stated positively that the truck was on the wrong side of the highway when the collision occurred and the Hudson was on its right side?

A. I had no proof of it, it was just an opinion. I still don't know what happened.

Q. As a matter of fact, the proof was that every indentation, [386] every tire mark, every bit of debris, every bit of glass and metal was north of the center line, isn't that correct?

A. Not every bit.

Q. Can you name one thing that you found prior to and including the 13th day of July when you last testified before that jury at Flagstaff, that you found south of the white line?

A. I believe I stated before that prior to the clearing up before the fire worked and after the fire hose worked I was on both sides of the highway throwing junk left and right, north and south. There were no marks on the pavement on the south,

(Testimony of Roy H. Bryfogle.)

they were all on the north, but the debris was all over the place.

Q. As a matter of fact, do you remember a camera that was picked up out there by the Flagstaff officer?

A. No, sir.

Q. There was a camera, was there not, found west of this culvert and in the north ditch, do you recall that?

A. I know nothing about the camera.

Q. Well, Officer, when this trailer trunk bent, as it did here—you see how that is bent?

A. Yes, sir.

Q. When that bent like that the contents that were in there were catapulted, weren't they?

A. They were strewn all over a great area.

Q. They took on a certain direction, didn't [387] they?

A. Not any positive direction.

Q. Do you remember some birthday napkins?

A. No.

Q. You don't remember that?

A. I don't remember anything I picked up other than picking it up and throwing it out of the road. I had no concern with anything other than clearing the traffic.

Q. Will you look at this and say when this man's birthday was?

A. It was the day he was killed.

Q. This was his birthday, wasn't it?

A. Yes.

Q. And there was indication his family was celebrating his birthday with him?

(Testimony of Roy H. Bryfogle.)

Mr. Wilmer: He is getting clear outside the bounds of materiality, if it please the Court.

Mr. Palmquist: If your Honor please, there was testimony concerning birthday napkins.

The Court: I think as far as there is any materiality in that, it has been established there were birthday napkins out there.

Q. (By Mr. Palmquist): You can't even remember the birthday napkins? A. No.

Q. You don't remember a camera? [388]

A. No.

Q. Do you remember anything that was picked up? Name some of the objects picked up?

A. I repeat, when I picked the stuff up I threw it, removed the objects, I threw it off the highway. Mr. Veazey brought his pickup truck and loaded the debris on it.

Q. Let me understand this. When you came out there, you found two dead people in the car?

A. One dead person. One died in the hospital or on the way to the hospital.

Q. I believe you said she was in the front seat, too, is that correct?

A. When I came to the scene of the accident she was in the right front, as I recall. I don't recall, but she was still in the car. The nurse was by her side.

Q. You mean with those two dead people and the little injured girls, wasn't one of those girls trapped in the car?

A. Not in the sense you say trapped, no; she had easy access out the right side.

(Testimony of Roy H. Bryfogle.)

Q. Didn't you have trouble getting one of them out, one of the girls out of the rear?

A. They had a lot of stuff in the car, they had to crawl over it.

Q. Didn't you have some trouble getting the rear door open?

A. I think they came out the front door, I don't remember. [389]

Q. You remember, Officer, under those circumstances you are going up and down the highway throwing stuff off the highway?

A. I will tell you what caused me to do that. As passing traffic would pass in the eastbound lane you would hear them run over it; rather than have another accident, I ascertained I couldn't help the driver, the nurse was taking care—she was a registered nurse—she was taking care of the one that possibly could still be alive. She could do a much more adequate job than I could; I went and started helping clean up the road, which is part of my duties.

Q. You mean there was traffic going by here without paying any attention to these injured and dead people? A. Yes.

Q. As a matter of fact, Officer, when you arrived out there there was a big truck blocking both lanes of travel?

A. No, he was blocking the westbound lane. He was blocking the scene.

Q. He had pulled across to block both lanes, hadn't he? A. No, I got around him.

(Testimony of Roy H. Bryfogle.)

Q. There was another man there with a flash-light stopping traffic and traffic was being stopped?

A. To allow the flow of one-way traffic.

Q. And they kept the traffic out of this north-bound lane, right? [390]

A. Correct—you mean the westbound lane?

Q. As a matter of fact, at the time you took the pictures of the dead man in the car there was no traffic flowing through there at all, is that correct?

A. Oh, no, they were flowing through. I have no right to stop traffic unless the road is completely blocked, then I have no control over it.

Q. Regardless of what you said or didn't say, do you think the left rear wheel of that Hudson, being in the condition it was in, could have caused the indentation in the pavement?

A. I don't know. It could have. I don't know what caused those indentations.

Q. All right. Then, Officer, as a matter of fact, was there anything about this washing process that so much emphasis has been put upon that would have caused marks to be washed away south of the center line and marks north of the center line to remain?

A. It wouldn't wash away marks.

Q. You weren't suggesting to this jury then that sprinkling of that water on the gasoline out there to prevent a fire washed any evidence away?

A. It washed evidence away that we used for proof of where the point of impact was, such as dirt knocked from fenders, glass and other things that

(Testimony of Roy H. Bryfogle.)

fall from the vehicles when they make contact, possibly fused pieces of metal. [391]

Q. You saw Phil Cook come out there, did you not? A. Yes, sir.

Q. He has testified he saw debris on the north side of the center line, I guess you saw such debris?

A. Yes.

Q. You were the man that was there to investigate this accident, weren't you? A. Correct.

Q. And one of the things you knew would be very important in this case, particularly when you saw those injured children and the dead parents, was the point of impact? A. Right.

Q. And as a trained officer—you have had F.B.I. school training, haven't you? A. Yes, sir.

Q. You have also been down to the University of Arizona for the course they give there?

A. No, sir.

Q. What training have you had in the investigation of these accidents besides the F.B.I. school training?

A. I was an accident investigator for the New York Police Department for darned near two years. I handled all in my district. I had intensive training by the New York P. D.

Q. How close to two years is "darned near two years"? A. About eighteen months. [392]

Q. You must have learned the value of the point of impact then? A. Correct.

Q. Did you learn one of the important things was to keep people from destroying evidence?

(Testimony of Roy H. Bryfogle.)

A. I also found out through the carelessness of bystanders with cigarettes for highly inflammable material, my first thought was to protect as much as possible the area there, and if some fool had dropped a lighted cigarette or a match or something, poof. That is why I ordered the Fire Department to come out there.

Q. You were out there before they got there?

A. Right.

Q. In fact, Flick even got there before they got there?

A. Right.

Q. They didn't come along until at least twenty minutes after you got there?

A. They came there soon after I got there, I don't know how soon.

Q. You had at least twenty minutes of walking around there? You weren't just out there protecting personal property that you didn't want to get run over, were you?

A. It takes time for one to ascertain the condition of the people, secondly, as I have explained to you before, my primary purpose is to flow traffic through there without [393] causing a jam, without causing additional hazards. That was when I went around and picked up some debris and threw it off the road. The traffic was flowing through there east and west at all times, first a movement east and then west. How soon the fire truck got out there I don't know, but as soon as he did come out there he washed it down. In fact, I believe Flick had

(Testimony of Roy H. Bryfogle.)

passed him getting to the accident, but that I am not sure of.

Q. Is it your testimony then, so we can understand you, that you didn't have time to observe before this washing process took place the important debris that you needed to help you establish point of impact?

A. That is right; I didn't have the opportunity or I would so state.

Q. Did you explain that to the coroner's jury on July 10th when you told them you established the point of impact as five feet, two inches north of the white line?

A. They didn't ask the questions. I didn't volunteer the answers unless they asked them.

Q. Did you or did you not tell that coroner's jury on July 10th, 1954, that you found the point of impact five feet, two inches north of the white line?

A. I found what I assumed to be the point of impact, but I wasn't sure. I still am not sure.

Q. You mean you are still not sure? [394]

A. I don't know what happened in that accident, no.

Q. Well, now, I thought you said a day or two later you changed your mind. That was when I interrupted and said, "What was that answer," and you said, "A day or two"—

A. I changed my mind that the vehicles had met—they had met somewhere on the road there, but I have not made any definite statements as to who caused the accident or where it was caused or what

(Testimony of Roy H. Bryfogle.)

caused the indentations in the pavement. I don't know.

Q. Officer, you don't need F.B.I. training to know the vehicles met some place there on the road, do you? A. Right.

Q. You don't need F.B.I. training to know that when they met things began to explode?

A. Right.

Q. And the pavement got scratched?

A. Right.

Q. Tires began to lay down marks?

A. Right.

Q. You didn't need F.B.I. training to go out there and take a look and see marks and say whether they were north or south of the center line, did you? A. No.

Q. Just good old common sense would do that, wouldn't it?

A. I had nothing to corroborate it though. [395]

Q. Wouldn't common sense do that?

A. It wouldn't do any good with me in a court of law. I had nothing to back it up.

Q. We will get to you in a minute. I want to know what happened a day or two later that caused you to change this opinion when you told that coroner's jury July 10th that this accident happened north of the center line, that caused you to change your mind?

Mr. Wilmer: If it please the Court, counsel is again going back into the matter assuming, he is stating to the jury and in the presence of the jury

(Testimony of Roy H. Bryfogle.)

what is in the transcript, which your Honor has ruled out.

The Court: He is asking him——

Mr. Palmquist: He said he wasn't——

The Court: If counsel wouldn't argue the matter. Counsel has asked the witness what occurred to cause him to change his mind. I will permit him to answer that question. But the series of questions that counsel has been asking him about, whether you need F.B.I. training for this or that, that is purely argument.

Q. (By Mr. Palmquist): All right. What happened a day or two—are you talking about July 11th now or July the 12th?

A. In that area there. I am not talking about any specified date. I have not chronologically measured my movements or made notations of my movements. [396]

Q. You said, it was your words, was it not, "A day or two later"? A. Yes.

Q. Would a day later be July 11th?

A. In a way the 11th would be another day, because it started out so early, and it could have been the 12th. And it could have been the 13th. I have been out there so darned many times I couldn't tell you.

Q. Who have you been out there with?

A. Myself. I went out with Roy Wacker and I went out with myself for my own edification.

Q. You remember on July 13th, that would be three days later, wouldn't it? A. Yes, sir.

(Testimony of Roy H. Bryfogle.)

Q. Do you remember on July the 13th, 1954, at 10:50 o'clock a.m., the coroner's inquest reconvened with all members of the jury being present, Shelby McCauley, Esquire, Justice of the Peace and Ex Officio Coroner, in and for Flagstaff Precinct, in and for the County of Coconino, State of Arizona, and a jury of six. You remember that?

A. Yes, sir.

Q. July 13th, 10:50 o'clock a.m. Do you remember by that time the eldest daughter had arrived to identify the parents, right?

A. Yes, sir. [397]

Q. Do you remember at that time a juror asked you again where the point of impact was——

Mr. Wilmer: Just a moment, counsel——

Mr. Palmquist (Continuing): ——and you referred to your notes——

Mr. Wilmer: Just a moment, counsel.

Mr. Palmquist: May I finish, counsel?

Mr. Wilmer: No. I object to counsel standing before the jury and reading from what appears to be the transcript.

Mr. Palmquist: I am not reading. I am asking him if he remembers.

Mr. Wilmer: That is something trying to transgress the Court's ruling earlier.

Mr. Scoville: It is some time, your Honor, it is one or two days and this is the 13th.

Mr. Wilmer: I have no argument about that.

The Court: Ask him if he was asked this question and made that answer.

(Testimony of Roy H. Bryfogle.)

Q. (By Mr. Palmquist): Do you remember that you were called back up to the stand by Mr. Dragonette, by one of the six jurors, and he asked you this question: "The only question really I have to ask, Mr. Bryfogle, is whether this truck was actually occupying part at least of the wrong lane of the highway, that is, part of the Sanders' vehicle's lane?"

And do you remember you gave the answer: "Yes, sir." [398]

A. Yes. The left wheels of the duals show that. I don't deny he was parked in the wrong lane.

Q. "Yes, sir," right? A. Right.

Q. And do you remember Mr. Dragonette then said: "Q. Approximately how much, just about?" And you answered: "Just a second. " Then: "(The witness refers to his notes.)" Then you said: "The point of impact where both vehicles met was five feet, two inches in the westbound lane of traffic, in the Sanders' lane." Do you remember giving that answer? A. If you say it is there, it is there.

Q. I will ask you to read it.

Mr. Wilmer: The witness has admitted it. There is no occasion to take time to have him read it.

The Court: It isn't necessary to do that.

Q. (By Mr. Palmquist): Then do you remember Mr. Dragonette asked you, he says: "It was a corner-to-corner collision rather than a direct head-on collision?" And you answered: "Yes, sir. The left front of both vehicles made contact."

"Q. In other words, there is reason to presume

(Testimony of Roy H. Bryfogle.)

that had the truck been on his own lane there would have been no crash at all?" And you answered: "Yes."

Do you remember giving those answers on July 13th? A. All right.

Q. Is that right? [399]

A. That is right. He was over in the other lane with his wheels.

Q. Well, now, somebody has been working on you for a long time up there at Flagstaff as the year has gone by, haven't they? A. Not a bit.

Q. What? A. Nobody works on me.

Q. As a matter of fact, this Mr. Wacker—that was your testimony on July 13th; there was no question in your mind, the impression you left with that coroner's jury, was there?

A. In the beginning I said I assumed, and I have assumed all along. I have nothing to prove it happened there. I have had nobody work on me.

Q. As a matter of fact, you are trying to create on this jury in this Federal Court a very different impression than the jury of six up there at the Coroner's inquest?

A. I don't know what happened. I have told that to your side of counsel and I have told that to Mr. Wilmer, I don't know what happened.

Q. As a matter of fact, you broke your neck trying to get this truck driver arrested for negligent homicide, didn't you?

A. It is a custom of the Patrol to cite somebody. If the County Attorney won't do it I am clear.

(Testimony of Roy H. Bryfogle.)

Q. Do you remember talking to Mr. Harold Scoville here [400] last Saturday for the first time?

A. Yes, sir.

Q. The first time he ever talked to you about this case?

A. Yes, sir.

Q. Do you remember honestly the conversation you had with him?

A. I don't remember—I remember what it is about. What I said, I don't recall.

Q. Do you remember telling him this Roy Wacker, as you put it, had been working on you for a long time about these marks?

A. He worked on me after the accident. He brought me out and pointed things out to me.

Q. Now, you mean he took you out here and said, "Look. Look at these marks"?

A. He pointed those other dual tracks in the other lane of traffic, the eastbound lane of traffic.

Q. As a matter of fact, that was after the 13th, more than three days after traffic—and I assume traffic was allowed through here on the 11th if they were allowed by when the dead people were there?

A. Nobody stopped them.

Q. They were allowed by there on the 11th, the 12th and 13th; and you mean some time later, as you told Mr. Scoville, this insurance man took you out there and showed you some [401] marks, that you didn't see there before, is that right?

A. I didn't see them, no.

Q. Could you see them when he took you out

(Testimony of Roy H. Bryfogle.)

there and showed them to you some time after the 13th?

A. I don't remember seeing them except when he pointed them out in the picture. I didn't connect them with the accident.

Q. You mean he didn't take you out there and point them out on the pavement, he showed you some in a picture?

A. He took me out and took me over the scene.

Q. Did you see the marks at the scene?

A. I don't remember seeing the marks at the scene; I saw them in a picture that was taken.

Q. You don't know by what device those pictures were taken?

A. I know who took the pictures and I didn't fix it up with the accident or connect it with the accident.

Q. That man that took the picture wasn't there at the accident, was he? A. No.

Q. You saw these pictures some time quite a bit later in the year after this thing had been testified to and so forth, isn't that right? A. Right.

Q. Would you come down here and finish these lines out for me so I can get those marks there? So there will be no confusion on these, I will make these the arrows. This is [402] where it left the concrete? A. Yes.

Q. I am continuing the length, you say we ran out of paper.

A. You want me to continue——

Q. You said there were no marks?

(Testimony of Roy H. Bryfogle.)

A. Yes, you have them in the picture.

Q. Can you show me marks south of the center line in the picture?

A. You showed me right duals.

Q. Show me those marks south of the center line.

A. That is too blurred, I can't. You asked me to finish a picture eight feet——

Q. I asked you finish the length.

Mr. Wilmer: You asked him to measure over eight feet and draw a corresponding line.

Mr. Palmquist: You mean you told him to do this at recess time.

Q. (By Mr. Palmquist): I asked you to come down here and finish the length. You know what I want you down here for.

A. What have we got?

Q. Are you confused?

A. I want the smaller one.

Q. How long were those marks, Officer? I was simply interested in the length. You have got them started.

A. How long are they? [403]

Q. Yes. Here is all I want you to do. You told us it was eighty-nine feet from where they started to where they left the concrete. You said it was one hundred one feet—start out here and measure out one hundred one feet.

A. You wanted me to put it by the post is where we ran into difficulty.

Q. I want you to measure out here one hundred one feet, will you?

A. It is three feet to the inch?

(Testimony of Roy H. Bryfogle.)

Q. That is right. Thirty inches would be ninety feet. It is one hundred how many feet?

A. One.

Q. Add another eleven feet on it.

A. That would be one hundred thirty-three feet if there is three feet to the inch. Thirty makes it ninety, ninety-three, ninety-six, ninety-nine, one hundred, one hundred one. Somewhere in the vicinity here.

Q. All right. Those were obviously made by that truck and tractor, right? A. Yes.

Q. Now, you have got it off the highway and it actually was off the highway and off the asphalt, is that right? A. Yes.

Q. How far was it off the asphalt, did you measure that?

A. Not off the asphalt. I had it measured from the center [404] line, dividing line of the pavement, rather, from the edge of the concrete.

Q. All right, edge of the concrete is where, how far was it over?

A. The right rear duals were nine feet, five inches.

Q. Right rear—— A. Right rear duals.

Q. So to the right rear duals, and that measurement—— A. Nine feet, five.

Q. ——was nine feet, five inches, right rear duals? A. To the right rear duals.

Q. You may be seated. So it was the right rear duals you measured after all, not the left?

A. No; that is the right rear duals from the edge

(Testimony of Roy H. Bryfogle.)

of the concrete. I measured the left rear duals from the supposed point of impact to where it came to rest.

Q. All right. Did you say you never did have any idea what happened in this accident?

A. Not a clear idea, except two cars met, but what caused them to meet I don't know.

Mr. Palmquist: May I have this identified?

Q. You drew a picture of what you think happened, didn't you?

A. That is an opinion I have to send in to the Patrol.

Q. Do they want sound opinions or just want guesses? [405]

A. They want opinions.

(Plaintiff's Exhibit 50 marked for identification.)

Q. (By Mr. Palmquist): They want you to look in a crystal ball and come up with something, or want you to make judgments based on certain facts?

A. They want me to make it in the best of my ability in the short time that is allowed.

Q. By the way, Officer, NoDoz pills, have you ever taken one?

A. No.

Q. Do you consider these a dangerous——

Mr. Wilmer: If it please the Court, this is not proper cross-examination.

Mr. Palmquist: He has brought these in here.

The Court: The witness is no qualified expert in whether they are dangerous or not.

Q. (By Mr. Palmquist): You know the motor

(Testimony of Roy H. Bryfogle.)

laws of Arizona. Is there some law against taking a NoDoz pill?

The Court: He is not an expert on the law either.

Q. (By Mr. Palmquist): All right. Did you find a mark on the left side of the Hudson as you looked at that arrangement out there—I would like to have you look again at Plaintiff's 20? Do you remember making the statement that the left front wheel of that truck just ran right up over and upon that car?

A. It would appear so, something ran up and over it. [406]

Q. That is your honest opinion and is even today, isn't it, when you look at that bumper and that wheel, something had to happen to drive that bar from the top down through this man's head?

Mr. Wilmer: This man is not an expert in interpreting pictures. Let the jury look at the pictures and make up their own mind.

Mr. Palmquist: This is the expert they brought in here.

Mr. Wilmer: I didn't bring him in as an expert to interpret the pictures. They speak for themselves.

The Court: We will let the jury judge what the pictures show.

Q. (By Mr. Palmquist): Officer, regardless of this picture, did you express that as your firm, honest belief that that truck actually ran over that Hudson?

A. That is just one of my opinions what happened. I could conjure up a couple of them.

(Testimony of Roy H. Bryfogle.)

The Court: The question is, did you express that opinion?

The Witness: I expressed an opinion subsequent to that, yes, sir.

Q. (By Mr. Palmquist): Did you get that from looking in some crystal ball or did you get it from looking at the evidence of the accident?

A. I looked at the wheels of the semi, which were smashed back, the obvious demolished car. Something on the truck went [407] over the car. Something caused the wheels of the truck to get smashed back.

Q. Is that one of your firmly fixed opinions or is that one you have, then don't have?

Mr. Wilmer: This is argumentative, if it please the Court, and getting us nowhere.

The Court: I will let him answer. Do you still have that opinion?

A. I have that among others, yes, sir. That is one of my opinions.

Q. (By Mr. Palmquist): You use the word "conjure up, conjure up"? A. Yes.

Q. I fail to understand what you mean by that, Officer, conjure up. You conjured this up?

A. No. No, you grasp a lot of ideas out of the air.

Q. Well, Officer, you take sides in these cases before you even investigate them?

A. I never take a side in any case, no, sir, except when I have a criminal action.

Q. Do you know—what is the name of this outfit? A. Arizona Adjustment Agency.

(Testimony of Roy H. Bryfogle.)

Q. You are certainly taking sides when you call them, aren't you?

A. No. I don't tell them to come out for a specific party. [408] Sometimes they are with me and sometimes they are against me. The last time I was in this Court we were opposite and he was called on that.

Q. Well, you have got the guy out there holding the tape with you.

A. I have to have someone holding the tape for me.

Q. Wasn't Officer Flick out there? Don't you get a follow up?

A. Officer Flick was concerned with directing the flow of traffic past the area. Someone had to protect the area and ourselves out there.

Q. Well, as a matter of fact, this man was there as quick as you were, isn't that correct, this Wacker?

A. No.

Q. In fact, he could have picked some things up and thrown them around if he wanted to?

A. Maybe he did. A lot of people did at my direction to clear the road. Then we cleared the area of bystanders.

Q. He could go around and ask people, "Did you see this accident, what is your name and address," and so on, right, right there at the scene?

A. He could, but he didn't?

Q. How do you know he didn't?

A. Because if I catch them doing it once I never allow them on the scene of an accident again. I have

(Testimony of Roy H. Bryfogle.)

them out there to [409] assist me as much as possible without taking one side or the other.

Q. You are doing the taxpayers a favor, saving the taxpayers' money to save hiring an officer, is that why he goes along?

A. In an action such as this I need all the help, all the qualified help I can get. The usual help you can get from a bystander isn't worth a darn. They will hinder you more than help you. If I can get someone I know to assist me as much as possible until the danger is cleared up, until the injured are out of the area and the road is clear, I will accept anybody's help.

Q. Mr. Carl Mangum might be interested in hearing from you, you might——

The Court: Counsel, I am going to ask you to please finish your cross-examination in the next fifteen minutes.

Q. What is in it for Mr. Wacker; he got out of bed to go out there, didn't he? A. Yes, sir.

Q. 3:00 o'clock in the morning, July 10th? Do you pay him for that service you say he renders?

A. No, sir.

Q. He has a distinct motivation of going then, I take it?

A. He comes out to assist me and assist himself. He handles about ninety-nine per cent of the motor carriers on [410] the road, his agency does or the agency he works for. If I have a Greyhound in an accident, I call another adjustor that I know handles for the Hound.

(Testimony of Roy H. Bryfogle.)

Q. Who do you call that might be interested in preserving evidence for dead people that cannot help themselves?

Mr. Wilmer: If it please the Court, we object to it as argumentative, certainly will serve no useful purpose in getting anywhere.

Mr. Palmquist: Your Honor, I think we are getting to something pretty vital.

Mr. Wilmer: Go right ahead, counsel.

The Court: You are assuming something, counsel, maybe you will have to reframe your question.

Q. (By Mr. Palmquist): You call anybody—I am just wondering if I was coming through Arizona with my wife and my children and I should suddenly be killed and my little youngsters be out there on that highway, would there be anybody there to represent my children and me as well as——

The Court: Counsel, that is a speech, not a question. Let's be reasonable about this thing.

Mr. Palmquist: If your Honor please, I believe he is taking sides.

The Court: I can note your manner and tone of voice, what you are going into. I am asking you not to make a speech.

Mr. Palmquist: All right. I have no questions. I will [411] handle it in argument.

(Testimony of Roy H. Bryfogle.)

Redirect Examination

By Mr. Wilmer:

Q. Mr. Bryfogle, if you were to complete the green line that you started down here, which you were initially requested by counsel to draw, that would continue on from this point on to the additional distance, wouldn't it? A. Yes, sir.

Mr. Wilmer: That is all.

We have a few questions from Mr. Ripka, your Honor. I will try to be as brief as I possibly can.

GILBERT RIPKA

recalled as a witness, having been previously sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. Gilbert, I am not going to cover anything that has been covered before, so be on your toes, will you please?

At the time you stopped at Kingman before this accident, I believe you testified a friends of yours woke you up? A. Yes, sir.

Q. Who was that? A. Mr. Al Solomon.

Q. Then you proceeded easterly, did you?

A. Yes, sir. [412]

Q. Did you leave in company with Mr. Solomon?

A. No, sir.

Q. Did he leave ahead of you?

(Testimony of Gilbert Ripka.)

A. Mr. Solomon left ahead of me.

Q. Did you later come upon him?

A. Yes, sir.

Q. What happened?

A. He had a couple of tires flat and I loaned him one of my tires. We had to break it off the rim and change rims. This is at Saligman.

Q. Then did you have an arrangement to meet him to pick up your tire later?

A. Yes, sir, at Flagstaff.

Q. What kind of rig was he driving with respect to being heavy or not heavy, with respect to yours?

A. He has a five-axle rig, consists of a three-axle tractor and a two-axle trailer.

Q. Was he faster or slower? A. Slower.

Q. You went on ahead of him, did you?

A. Yes, sir.

Q. At the time you left him at Saligman until the time of the accident, did you stop again?

A. Yes, sir.

Q. Where did you stop? [413]

A. About a mile before the Ordnance Depot.

Q. That would be west of the accident?

A. That would be west of the accident.

Q. How did you stop, what did you do?

A. I stopped and checked my tires, checked my equipment and more or less gazed around, took in the scenery for a few minutes, got back in and took off.

Q. Were you running ahead of Mr. Solomon?

A. Yes, sir.

(Testimony of Gilbert Ripka.)

Q. Could you hear him coming?

A. No, sir. I listened for him at the time to see if I could hear him pulling a grade.

Q. I take it you were going to have to stop at Flagstaff in any event to let him catch up with you to get a tire? A. Yes, sir.

Q. You told us with respect to the accident—I am not going into that again, Gilbert, with one exception. Counsel asked you to draw the area or indication of the area in which you believe the accident occurred, and you drew this line which he has marked with a dotted mark. The question as he asked it to you I do not believe is clear, but I would like to have you explain what you meant by that circular area there as to the portion of the highway where the accident happened.

Mr. Palmquist: Just a moment, if your Honor please, that is cross-examination of his own witness. [412]

The Court: I am going to let him explain what he meant by drawing it up there, by his answer to the question.

Q. (By Mr. Wilmer): Gilbert, just tell us. You were asked to draw or indicate where the accident occurred. Will you tell us what you meant to indicate by drawing that circle?

A. I meant it was the east and west portion of the highway, not the north and south. It was the south of the line the accident happened, but it was the length that I meant to express in the line.

Q. The length, that is the segment of the high-

(Testimony of Gilbert Ripka.)

way in which it occurred? A. Yes, sir.

Q. Did you intend to indicate by that you were or were not sure whether it was on the north or south half? A. Will you repeat that?

Q. Have you ever had any question in your mind whether the accident happened on the north half or south half of the highway? A. No, sir.

Q. You have never had any doubt?

A. There is no doubt in my mind.

Q. Tell me, Gilbert, you have been driving for ten years I believe? A. Yes, sir.

Q. Cover a good part of the United States? [413]

A. Yes, sir; all of it.

Q. This rig you were driving, whose property was that? A. That belonged to me.

Q. It belonged to you? A. Yes, sir.

Q. I believe you had one of your children?

A. Yes, sir.

Q. You have other children, do you?

A. Yes, sir.

Q. How many?

A. I have two other children.

Q. With respect to this mattress that you carry with you——

Mr. Scoville: Just a moment. He testified it was a blanket two or three times, not a mattress.

Mr. Wilmer: Blanket, I am sorry. I withdraw "mattress."

Q. I believe you stated you have something with you you used when you laid on the ground and slept? A. It was an Army comforter.

(Testimony of Gilbert Ripka.)

Q. An Army comforter? A. Yes, sir.

Q. How thick was it?

A. Folded up double it would be the thickness of a light mattress.

Q. Why did you carry that with you? [414]

A. Because various times when the weather was warm or rather hot I would stop and sleep under the truck because it would be cooler than sleeping in a hotel or motel. And I found I got a lot better sleep that way.

Q. With respect to your driving about the country, Gilbert, what has been your custom and habit if you find yourself becoming at all tired or sleepy?

A. I generally stop and sleep—I always stop and sleep.

Mr. Palmquist: Can we make sure you got that in the record?

(The last answer was read.)

Q. (By Mr. Wilmer): Now, where the weather is bad and so on, then what do you do?

A. If the weather is bad, cold, generally stop at a truck stop.

Mr. Wilmer: Cross-examine.

Cross-Examination

By Mr. Palmquist:

Q. You got this Army blanket at the same time you got that training in your split vision?

Mr. Wilmer: That is argumentative, if it please the Court, improper cross-examination.

(Testimony of Gilbert Ripka.)

A. No, sir; I bought this Army comforter off Army war surplus.

Q. (By Mr. Palmquist): Since the time you came up here and [415] we went over this very carefully, have you talked to Mr. Wilmer about this area "R-3" and he told you he was going to put you back on the stand? A. Yes, sir.

Mr. Palmquist: No further questions. Mr. Reporter, will you write up that part of the record for me, the portion dealing with "R-3"?

Recross-Examination

By Mr. Wilmer:

Q. Gilbert, since counsel has raised the question, I believe you were asked what you meant to indicate and you told me, and I told you I would put you back to tell the jury? A. Yes, sir.

Mr. Wilmer: That is all. We have nothing further, your Honor.

The defendants rest.

Mr. Palmquist: We rest.

The Court: Gentlemen, that is all of the evidence in the case. There remains the argument of counsel and the instructions of the Court. They will take some considerable period of time, so we will have those on Monday. Because we have matters set earlier in the morning on Monday I will ask you to come back at 10:30, if you will, please. At that time the matter will be argued to you by counsel and the instructions will be given and the case will

be submitted to you. [416] However, until the case is submitted to you the admonition given heretofore is still binding. Don't discuss the case with anybody else and don't make up your minds about the case until it is submitted to you. You are excused until 10:30 Monday morning.

(Jury retires from the courtroom.)

The Court: If I may, I would like to ask you to come in Monday at 9:00 on instructions. And may I say this is the way I would like to handle it: At that time I will pass on your requests and give you an opportunity there to make your record. I will ask you to make your record on the requests there. I will also give you at that time certain instructions that I have myself prepared, some of them after viewing the instructions you have tendered. I will ask you also to make a record on those instructions at that time. I will have some stock instructions that you won't hear or see, and may it be stipulated that as to those, counsel, after the jury has retired, may then make a record on any objection or exception they may have to parts of the instructions?

Mr. Palmquist: So stipulated.

Mr. Wilmer: So stipulated.

(Whereupon, a recess was taken until Monday, August 9, at the hour of 9:00 o'clock a.m.)

(The following proceedings were had in Chambers.)

Mr. Scoville: Plaintiffs have no exception to the [417] Court's 1 to 10.

(Testimony of Gilbert Ripka.)

Mr. Wilmer: I think, if it please the Court, the Defendants will except to the Court's Number 1, insofar as it impliedly excludes from the consideration of the jury the negligence of the husband, Herbert Noah Sanders. In other words, as worded the instruction completely separates the two claims, which the jury would imply that the negligence of the husband would not be imputed to the wife's estate.

We except to the Court's Number 2 or second instruction for the reason that it specifically excludes from the consideration of the jury the effect of the negligence of the husband, if found by the jury, against the wife.

That is likewise the basis for our exception to the Court's Number 3, in that it limits the issue of the negligence or effect of the negligence of the husband, if found by the jury, solely to the first cause of action.

That likewise is our basis for exception to the Court's Number 4 instruction, in that it excludes from the consideration of the jury the imputation of negligence on the part of the husband to the wife's estate.

Likewise it is our basis of exception to the Court's Number 6, in that it excludes from the consideration of the jury the possible effect of the negligence of the deceased, Herbert Noah Sanders, and the imputation thereof to the estate of his deceased [418] wife.

We have no exception to the remaining instructions.

The Court: I have numbered the Plaintiff's 1 to 8, the way they were given to me. I wonder if they are in the same order?

Mr. Scoville: Yes, they have been assembled in the same order.

The Court: I have numbered them as submitted to me, 1 to 8.

Plaintiffs requested Number 1 will be given with these modifications: In line 4, the word "do" is changed to "ordinary." And the same change in line 12, "do" is changed to "ordinary." Does counsel have any exceptions or objections as we go along?

Mr. Wilmer: We have none.

Mr. Scoville: We have none to the modification of Plaintiff's Number 1.

The Court: Number 2 will be refused as covered by the Court's 5 and 6. Those are the instructions where I define the issues in each of the claims.

Mr. Scoville: No objection.

The Court: Number 3 is refused as covered by the Court's 8.

Number 4 is refused as covered by the Court's Number 4, which is the Court's burden of proof instruction.

Number 5 will be given with these [419] modifications: In line 3 the word "traveler" is changed to "driver of a vehicle." In line 7, after the word "done," insert "under the same circumstances." Line 13, the word "travelers" changed to "driver."

Number 6, the first words in the first clause of the second sentence are stricken so that it begins: "You are instructed that it is established"——

Mr. Scoville: You are striking everything down to there?

The Court: Down to there. In other words, that is educational but we get right to the crux of it here by telling them, "You are instructed it is established"——

Then down in line 14 after the word "liable," insert "to plaintiffs."

Mr. Scoville: I believe this is, "Wilson Brothers Trucking Company." I notice the word "Transportation."

The Court: It should be "Trucking."

Mr. Scoville: Yes, sir; Wilson Brother Trucking Company.

The Court: Then the last sentence will be stricken because the rest of it says it all.

Number 7 is covered by the Court's 1.

Number 8. On that the defendant has submitted Number 4, which is this same instruction with the additional element of reducing the present value. I am going to give [420] the Defendants' Number 4 except the last paragraph of it. Plaintiff's Number 8 is refused because covered by Defendants' Number 4 as modified.

The Court: On defendant's request of instructions, Number 1 is refused insofar as it is covered by the Court's 9.

Mr. Wilmer: We except to the Court's refusal to instruct the jury that if they find the decedent

Sanders was suffering from active tuberculosis the table is inapplicable.

The Court: Number 2 will be given.

Number 3 is refused as covered by the Court's Number 10.

Mr. Wilmer: I believe it is covered.

The Court: Number 4 will be given as modified by striking the last paragraph.

Mr. Wilmer: On Number 4, we will except on the ground that in the absence of either expert testimony or an instruction covering the matter, that there is nothing from which the jury may accurately be lead to a proper determination of the meaning of actual or present value. In other words, it is our position that either or both must occur, that is, actuarial testimony or similar evidence as to how you compute present worth, or the Court's instructions must instruct them on how to do it.

I would like to renew our motion for a [421] directed verdict on the grounds stated at the close of the plaintiff's case, rather than reargue, unless the Court wants that done. The record may show that.

I believe also we indicated a desire to make the offer of proof with respect to the one witness, the Cammack boy.

The Court: Yes.

Mr. Wilmer: May the record show if the witness had been permitted to answer the question he would have stated that Mr. Sanders told him that when he went on a trip it was his habit to drive from twenty-eight to thirty-six hours at a stretch.

The Court: The motion for a directed verdict is denied.

I will give an hour and a half to each side for argument and counsel will be responsible for keeping track of their time. An hour for opening.

(The following proceedings in the courtroom.)

(Argument by counsel to the jury.)

The Court: At this time we will recess until 1:00 o'clock. At that time the arguments will be concluded and instructions given and the matter submitted to you. We will recess until 1:00 o'clock.

(Noon recess.)

(Argument by counsel concluded.) [422]

COURT'S INSTRUCTIONS

The Court: Gentlemen, you have now heard all of the evidence in this case and the arguments of counsel. At this time it is my function and my duty to instruct you as to the law that applies to the case. It is your duty as Jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case and consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power; it must be exercised with sincere judgment, sound discretion and in accordance with the rules of law that will be stated to you in these instructions.

If, in the instructions, any rule or direction or idea be stated in varying ways no emphasis thereon is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all of the instructions and as a whole and to regard each in the light of the others.

I instruct you that although there is but a single complaint filed in this case there are actually two plaintiffs in the action and two separate claims or causes of action filed by the plaintiffs. Ralph Wanek, administrator of the estate of Herbert Noah Sanders, is the plaintiff in the first [423] claim or cause of action; and Ralph Wanek, administrator of the estate of Delphia F. Sanders, deceased, is the plaintiff in the second claim or cause of action. The case of each plaintiff is separate from and independent from that of the other. The law permits the claims of each plaintiff to be joined in a single complaint, because the claims arose out of the same accident. However, the rights of the plaintiffs, if any, and each claim or cause of action are separate, and the instructions given to you apply to each plaintiff unless otherwise stated. Accordingly, you are instructed to determine the claim or cause of action of each plaintiff separately to the same effect as if you were trying two separate suits or cases. In this connection, however, there is one exception to be noted. The defense of contributory negligence is submitted to you as against only the plaintiff in the first cause of action in the complaint, that is, as

against only the plaintiff Ralph Wanek as administrator of the estate of Herbert Noah Sanders, deceased. Therefore, the instructions concerning the subject of contributory negligence apply only as between that plaintiff and the defendants.

You are instructed that it is established that the defendant, Gilbert Ripka, at the time of the collision complained of, was the servant and employee of the defendant, Wilson Brothers Truck Line, Inc., a corporation, and he was acting within the scope of his employment and authority. Therefore, I [424] charge you that the conduct of the defendant, Gilbert Ripka, shall be deemed by you to be the conduct of the defendant, Wilson Brothers Truck Lines, Inc., a corporation. And if one is liable to the plaintiffs, both are liable.

Statements and arguments of counsel are not evidence in the case unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the Jury must accept the stipulation as evidence and regard that fact as conclusively proved. The evidence in the case consists of the sworn testimony of the witness, all exhibits which have been received in evidence, and all facts which have been admitted or stipulated.

You are to consider only the evidence in the case, but in your consideration of the evidence you are not limited to the bare statements of the witnesses. On the contrary, you are permitted to draw from the facts which you find have been proved, such inferences as seem justified in the light of your experience. An inference is a deduction or conclusion,

which reason and common sense lead the Jury to draw from the facts which have been proved.

In the present action, certain testimony has been read to you by way of deposition. You are instructed that you are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. It is entitled to the same consideration, the same rebuttable presumption that the [425] witness speaks the truth, and the same judgment on your part, with reference to its weight, as is the testimony of witnesses who have confronted you on the witness stand.

At times throughout the trial, the Court has been called upon to pass on the question of whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings, and are not to draw any inference from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the Court does not determine what weight should be given such evidence, nor does it pass on the credibility of the witness. As to any offer of evidence which has been rejected by the Court, you, of course, must not consider the same. As to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection. Any evidence ordered stricken out by the Court must be entirely disregarded.

You are made, by law, the sole judges of the evidence in this case, and of the credibility of the

witnesses. It is for you alone to determine the weight to be given to the evidence, and its effect and sufficiency to establish any fact, in support of which it has been offered. In so determining, you may take into consideration the apparent character of the witnesses, their appearance and deportment on the witness stand, the [426] extent of their knowledge of the things about which they have testified, any interest or motive that may appear to you, the manner in which they or any of them may be affected by any verdict which you render, the reasonableness and consistency of their statements; and from these considerations and any others that may have appeared to you in the case as it has been presented to you, you may judge and determine as to the credibility of each witness, and the weight and the effect and the sufficiency of his testimony.

If you believe that any witness has wilfully sworn falsely as to any material fact in the case, then you are at liberty to disregard the entire testimony of that witness, except insofar as it may be corroborated by other credible evidence in the case.

In arriving at your verdict in this case, you are not to be influenced by any sympathy or prejudice for or against any party. Neither sympathy nor prejudice has any place in your considerations. Your verdict must be that which is right and just under the evidence and the instructions given you by the Court.

In civil actions, and this is a civil action, the party, who asserts the affirmative of an issue, must carry the burden of proving it. In other words, the

burden of proof as to that issue is on that party. This means that if no evidence were given on either side of such issue your finding as to it [427] would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of the evidence, by which is meant, such evidence as when weighed with that opposed to it has more convincing force and from which it results the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof. Namely, the one who asserts the affirmative of the issue.

Negligence is the doing of some act, which a reasonably prudent person would not do; or the failure to do something which a reasonably prudent person would do, under the same or similar circumstances. It is the failure to use ordinary care in the management of one's property or person. Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs, in order to avoid injury to themselves and others.

Inasmuch as the amount of caution used by the ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care the amount of caution required will vary in accordance with the nature of the act and the sur-

rounding circumstances. To put the matter in another way, the amount of caution required by the law increases or decreases as does [428] the danger that should reasonably be apprehended.

The proximate cause of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury.

Contributory negligence is negligence on the part of a person injured which, concurring in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains. Contributory negligence, if it existed in connection with the occurrences now under consideration, would have consisted of negligence on the part of Herbert Noah Sanders, deceased, which contributed in some degree as a proximate cause of his death. The administrator of one who is guilty of contributory negligence in relation to his own death, may not recover from another person for that death. The reason for this rule of law is not that the fault of one justifies the fault of another, but simply that there can be no apportionment of blame and damages among the participating agents of causation.

The mere fact that an accident happened, considered alone, does not support an inference that some party or any party to this action was negligent.

The law does not permit you to guess or speculate

as to the cause of the collision in question. If the evidence is [429] equally balanced on the issue of negligence or contributory negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then such party has failed to fulfill the burden of proof, and your finding must be against that party on that issue.

You are instructed that it is the duty of every person operating a motor vehicle, to exercise ordinary care and diligence in operating said motor vehicle so that the same will not cause injury to other persons.

By ordinary care and diligence we mean such care and diligence as a person of ordinary prudence and diligence would commonly exercise under like circumstances; and the degree of care and diligence required by law is always proportionate to the danger that might reasonably be apprehended from a failure to exercise such ordinary care and diligence. A failure to exercise ordinary care and diligence, as the same is herein defined and explained, is negligence as that term is used in this case.

I instruct you that the traffic laws of the State of Arizona, in force and effect at the time and place of the collision involved in this case, required the driver of each of the vehicles involved to drive his vehicle upon the right half of the highway. And the driver of each vehicle was required also to pass the vehicle coming from the opposite direction on the right, giving to such vehicle at least one-half of [430] the main traveled portion of the roadway, as nearly as possible.

You are instructed that a driver of a vehicle on a public highway proceeding on the right-hand side and meeting a person traveling on the wrong side is not, himself, responsible for the consequences of any ensuing collision, if he does all that a reasonably careful person would have done under the same circumstances to prevent it. He is not required to anticipate that an approaching automobile might cross to the left and come into collision with him. A motorist has a right to assume that the driver of a vehicle coming from the opposite direction will obey the law, and to act upon such assumption, in determining his own manner of using the road. A driver, therefore, proceeding on the right side of the traveled way, may assume that the driver of a vehicle approaching on his left-hand side, will do all that a reasonably prudent person under all the circumstances would do to avoid a collision, which ordinarily would be to yield half of the way or turn out in time to avoid a collision, and that such driver will not force him, in violation of the law of the road, to turn from the part of the road on which he is lawfully driving.

The issues to be determined by you with regard to the plaintiff's first cause of action in this case, are these:

First, was the defendant, Gilbert Ripka, negligent? If you answer that question in the negative, you will return a [431] verdict for the defendants on the first cause of action. If you answer it in the affirmative you have a second issue to determine, namely: Was that negligence a proximate cause of

the death of Herbert Noah Sanders, deceased? If you answer that question in the negative, plaintiff is not entitled to recover on the first cause of action. But if you answer it in the affirmative, then you must find on a third question: Was the deceased, Herbert Noah Sanders, negligent? If you find that Herbert Noah Sanders was not negligent, after having found in the plaintiff's favor on the other two issues, you must then fix the amount of plaintiff's damages on the first cause of action and return a verdict in his favor. If you find that Herbert Noah Sanders was negligent, then you must determine a fourth issue, namely: Did that negligence contribute in any degree as a proximate cause of the accident? If you find that it did, your verdict must be for the defendants. But if you find that it did not and you have previously found there was negligence on the part of the defendant, Gilbert Ripka, which proximately caused the death of Herbert Noah Sanders, you must then fix the amount of plaintiff's damages on the first cause of action, and return a verdict in his favor.

The issues to be determined by you, with respect to the plaintiff's second cause of action, are these:

First, was the defendant, Gilbert Ripka, negligent? If you answer that question in the negative, you will return a [432] verdict for the defendants on the second cause of action. If you answer it in the affirmative, you have a second issue to determine, namely: Was that negligence the proximate cause of the death of Delphia F. Sanders, deceased? If

you answer that question in the negative, plaintiff is not entitled to recover on the second cause of action. But if you answer it in the affirmative, you then will find what damage plaintiff has thus been caused to suffer, and return a verdict in his favor on the second cause of action for the amount thereof.

As to the claim or cause of action of each plaintiff, the burden is upon the plaintiff to prove by a preponderance of the evidence that the defendants were negligent and that such negligence was a proximate cause of the death of plaintiff's decedent. To establish the defense of contributory negligence, which has been interposed by the defendants, to the claim or cause of action of Wanek as administrator of the estate of Herbert Noah Sanders, deceased, that is, the first cause of action set out in the complaint, the burden is upon the defendants to prove by a preponderance of the evidence that the plaintiff's decedent, Herbert Noah Sanders, was negligent, and that such negligence contributed, in some degree as a proximate cause of the death of such decedent.

As I have indicated to you in discussing the issues which you have to decide in this case, you should first determine the question of liability, before you undertake to fix an [433] amount that will compensate for damage, if any, found to have been suffered.

According to the American Experience Table of Mortality, as it has been read into evidence, the expectancy of life of one aged forty-six years, is twenty-three and eighty-one one-hundredths years. And the expectancy of one aged thirty-nine years.

is twenty-eight and ninety-one one-hundredths years. This table is to be considered by you, in arriving at the amount of damages, if you find that the plaintiffs are entitled to recover in the action. However, the restricted significance of this evidence should be noted. Life expectancy shown by the mortality tables is merely an estimate of the probable, average remaining length of life of all persons in our country of a given age, and that estimate is based on not a complete, but only a limited record of experience. Therefore, the inference that may be drawn from the tables, applies only to one who has the average health and exposure to danger of people of that age. Thus, in connection with this evidence, you should consider all other evidence bearing on the same issue, such as that pertaining to the occupation, health, habits and activity of the person whose life expectancy is in question.

If after a consideration of the law as given you by the Court, and of the evidence, you find that the plaintiffs are entitled to recover, it will be necessary for you to assess damages in favor of Ralph Wanek as administrator of the estate [434] of Herbert Noah Sanders, deceased, and Ralph Wanek as administrator of the estate of Delphia F. Sanders, deceased, separately. The amount of damages should be fixed at the amount of pecuniary loss to the estate of each of those two persons. It is not necessary that any witness should have testified to the amount of such loss, but you should take into consideration the earning capacity, habits, character and probable length of life of the deceased, insofar

as they appear in the evidence, and fix the damages at the present value of the probable accumulations by Herbert Noah Sanders and Delphia F. Sanders during their lifetime, had they lived their allotted time, according to the mortality tables read in evidence.

The amount of damages, if any, should be such as the Jury deems fair and just, under the evidence in the case. If you should find in favor of a plaintiff, then in estimating the damages to which he is entitled, you will take into consideration the earning power of money; and if you award him damages, you must determine the present value of his pecuniary loss, if any, calculated as bearing interest at the highest net rate that can be had on money safely invested. The present value of a sum of money payable in the future is what that sum is worth if paid presently, paid now.

In my instruction on damages I have used the term, "probable accumulations of the deceased." I will now explain that term to you. In actions such as these for damages for the [435] death of a person, the damages allowable are those suffered by the estate of the deceased person, because the untimely death of the deceased prevented him or her, as the case may be, from acquiring, saving and transmitting to his or her estate, the additional amount, property or other assets which he or she would have acquired, saved and transmitted, had he or she lived out the natural span of his or her life. The probable accumulations of a deceased does not include any amounts or things of value which the

deceased would have earned or otherwise acquired, but would have spent or otherwise disposed of prior to his or her death. In order to determine the probable accumulations of a deceased in this case, you will determine how much his or her estate would have increased in value between the actual date of death and the time he or she would have died, but for the accident involved herein.

You are further instructed that the loss of support, care and maintenance by the minor children of the decedents, due to the death of Mr. and Mrs. Sanders in this accident, is not involved in this action and accordingly will not be considered by you.

You have been instructed on the subject of the measure of damages in this action, because it is my duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether you will need the instructions on damages. The fact they have been given to [436] you must not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict.

If during the trial, or in the course of these instructions, I have said or done anything which has suggested to you that I am inclined to favor the claims or positions of either party, you will not suffer yourself to be influenced by any such suggestion. I have not expressed nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are or are not worthy of belief, or what inferences should be drawn from the

evidence. If any expression of mine has seemed to indicate an opinion, relating to any of those matters, I instruct you to disregard it.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree, thereto. In other words, gentlemen, any verdict that you render in this case must be unanimous.

It is your duty as jurors to consult with one another, and to deliberate with a view to reaching an agreement. If you can do so, without violence to individual judgment.

Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced [437] it is erroneous. But do not surrender your honest convictions as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Upon retiring to the jury room, your first order of business will be to select from among your number one juror as your foreman. He will preside over your deliberations and he, the foreman, will be your spokesman in court.

For your convenience in the case, forms of verdict have been prepared; and, omitting the formal parts, I will now read them to you.

The first form of verdict: We the Jury, duly impaneled and sworn, in the above-entitled action,

upon our oaths, do find the issues made by the first cause of action in plaintiff's complaint, and the answer thereto, in favor of Ralph Wanek, administrator of the estate of Herbert Noah Sanders, deceased, and against the defendants Gilbert Ripka and Wilson Brothers Truck Lines, a corporation; and we do assess plaintiff's damages in the sum of (blank) dollars.

The second form of verdict is also with regard to the first cause of action of the complaint, and it, omitting the formal parts, reads: We the jury, duly empaneled and sworn, in the above-entitled action, upon our oaths, do find the issues made by the first cause of action in plaintiff's complaint and the answer thereto, in favor of the defendants, [438] Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, and against plaintiff Ralph Wanek, administrator of the estate of Herbert Noah Sanders, deceased.

The third form of verdict relates to the second cause of action of the complaint, and it, omitting the formal parts, reads: We, the jury, duly empaneled and sworn, in the above-entitled action, upon our oaths, do find the issues made by the second cause of action in plaintiff's complaint and the answer thereto, in favor of Ralph Wanek, administrator of the estate of Delphia F. Sanders, deceased, and against Gilbert Ripka and Wilson Brothers Truck Lines, a corporation, and we do assess plaintiff's damages in the sum of (blank) dollars.

The fourth and final form also relates to the second cause of action of the complaint, and it reads:

We, the jury, duly empaneled and sworn, in the above-entitled action, upon our oaths, do find the issues made by the second cause of action of plaintiff's complaint and the answer thereto, in favor of the defendants, Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, and against plaintiff, Ralph Wanek, administrator of the estate of Delphia F. Sanders, deceased.

You will take the forms of verdict with you to the jury room and when you have reached a unanimous agreement as to the verdicts in the cases, then the verdicts will be signed by the foreman. The foreman alone signs the verdict after you have agreed on the verdict. After that has been done [439] the jury will return, with the forms of verdict, into open court.

You may have all the exhibits in the case with you in the jury room, that is, all the exhibits that were admitted into evidence; and the Clerk will check them to be sure they are all there. Then they will be sent by the Bailiff to you in the jury room.

Do counsel have anything further?

Mr. Scoville: No further request, your Honor.

Mr. Wilmer: None, your Honor.

The Court: Gentlemen, you may retire in charge of the Bailiff.

(Jury retires from the courtroom.)

Mr. Wilmer: We have no further exceptions.

Mr. Scoville: Plaintiff has no exceptions. [440]

Reporter's Certificate

State of Arizona,
County of Pima—ss.

I, Fred L. Baker, do hereby certify that I am an Official Court Reporter in the United States District Court, District of Arizona, and that as such Official Court Reporter, I attended the trial in the foregoing-entitled cause; that I took down in shorthand all the oral testimony adduced, and proceedings had; that such shorthand was reduced to writing under my supervision, and the foregoing 440 pages of typewritten matter, contain a full, true and correct transcript of my shorthand notes, taken by me as aforesaid.

Witness my hand this 22nd day of October, 1955.

/s/ FRED L. BAKER,
Official Court Reporter.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD
ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records,

papers and files of the said Court, including the records, papers and files in the case of Charles Crehore, General Administrator of Estates of Herbert Noah Sanders and Delphia F. Sanders, Plaintiff, versus **Gilbert Ripka and Wilson Brothers Truck Lines, Inc.**, a corporation, Defendants, numbered Civ-411 Prescott, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon, are the original documents filed in said case; and that the attached and foregoing copies of the minute entries and civil docket entry are true and correct copies of the originals thereof, remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that the said original documents, and said copies of the minute and docket entries, together with the original exhibits transmitted herewith, constitute the record on appeal in said case as designated in the Appellants' Designations filed therein and made a part of the record attached hereto, and the same are as follow, to wit:

1. Plaintiff's Amended Complaint.
2. Minute entry of December 17, 1954 (granting leave to file amended complaint).
3. Answer of Defendant Gilbert Ripka.
4. Answer of defendants Wilson Brothers Truck Lines, Inc., a corp., et al.
5. Minute entry of August 4, 1955 (proceedings of trial).

6. Minute entry of August 5, 1955 (further proceedings of trial).

7. Minute entry of August 6, 1955 (further proceedings of trial).

8. Minute entry of August 8, 1955 (further proceedings of trial).

9. Plaintiff's Requested Instructions.

10. Defendants' Requested Instructions.

11. Verdict on the first cause of action.

12. Verdict on the second cause of action.

13. Plaintiff's motion for Substitution of Plaintiff and for Judgment Upon Verdict, and Consent of Charles Crehore to Substitution as Plaintiff.

14. Defendant's Objection to Substitution of Plaintiff and Objection to Entry of Judgment Upon the Verdict.

15. Minute entry of October 10, 1955 (Order substituting plaintiff and for Judgment on Verdict).

16. Civil Docket Entry of October 10, 1955 (Clerk's notation of entry of judgment in civil docket under Rules 79(a) and 58).

17. Defendants' Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial.

18. Minute entry of November 7, 1955 (Hearing on motions for judgment and for new trial).

19. Minute entry of December 16, 1955 (Order denying motion for judgment and motion for new trial).

20. Notice of Appeal.

21. Reporter's Transcript of Proceedings.

22. Bond for Costs on Appeal.

23. Appellants' Designation, Amended Designation and Supplemental Amended Designation of Contents of Record on Appeal.

24. Order Extending Time to File Record on Appeal and Docket Appeal.

I further certify that all original exhibits admitted in evidence, or marked for identification and not withdrawn, as designated by the appellants, are transmitted herewith as a part of this record on appeal, to wit:

Plaintiff's exhibits 1 to 10, 12, 13, 15 to 19, 19-A, 20 to 34, 37, 43 and 44, admitted in evidence, and 11, 14, 35, 36, 38, 39, 40, 41, 42 and 50, marked for identification.

Defendants' exhibits A, B, C, D, E and G, admitted in evidence, and H, marked for identification.

I further certify that the Clerk's fee for preparing and certifying this record on appeal amounts to the sum of \$5.60, and that said sum has been paid by counsel for appellants.

Witness my hand and the seal of said Court, this 3rd day of February, 1956.

[Seal] /s/ WILLIAM H. LOVELESS,
Clerk.

[Endorsed]: No. 15033. United States Court of Appeals for the Ninth Circuit. Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, Appellants, vs. Charles Crehore, General Administrator of the Estate of Herbert Noah Sanders and Delphia F. Sanders, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed February 17, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15033

GILBERT RIPKA and WILSON BROTHERS
TRUCK LINES, INC., a Corporation,

Appellants,

vs.

CHARLES CREHORE, Administrator of the
Estates of HERBERT NOAH SANDERS and
DELPHIA F. SANDERS, Deceased,

Appellee.

CONCISE STATEMENT OF POINTS TO BE
RELIED ON BY APPELLANTS ON
APPEAL

Appellants herein, Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, intend to rely upon the following points on appeal:

1. The District Court erred in admitting in evidence special letters of administration of Ralph Wanek and denying motions of appellants for a directed verdict, because of the insufficiency of proof as to the capacity of said administrator.

2. Misconduct of counsel for the appellee prejudicial to the rights of appellants whereby they were denied a fair trial.

3. Error of the District Court in failing to give instructions requested by appellants and in giving

instructions requested by appellee, and in giving instructions of its own motion.

4. Error of the District Court in substituting a general administrator for a special administrator, and in ruling that a special administrator has the capacity under the laws of Arizona to maintain a wrongful death action.

5. The verdict in each cause of action and the judgment entered thereon was the result of passion and prejudice, which vitiates the entire verdict and the judgment entered thereon.

6. There is no evidence whatsoever, of any kind, which would support the verdict of the jury, in either of the causes of action and the judgment entered thereon.

7. Appellants, by reason of the sympathy, passion and prejudice of the jury, have been denied a fair trial and the interests of justice require that a new trial be granted to appellants.

Respectfully submitted,

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Appellants.

Service of copy acknowledged.

[Endorsed]: Filed January 17, 1956.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD DEEMED MATERIAL TO A CONSIDERATION OF THIS APPEAL

Come Now Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, appellants herein, and designate the following portions of the record as material to a consideration of this appeal:

1. Plaintiff's Amended Complaint. (Record No. 1.)
2. Answer of defendant Gilbert Ripka. (Record No. 3.)
3. Answer of defendant Wilson Brothers Truck Lines, Inc., a corporation. (Record No. 4.)
4. Minute entry of August 4, 1955. (Record No. 5.)
5. Minute entry of August 5, 1955. (Record No. 6.)
6. Minute entry of August 6, 1955. (Record No. 7.)
7. Minute entry of August 8, 1955. (Record No. 8.)
8. Plaintiff's Requested Instruction No. 8. (Portion of Record No. 9.)
9. Verdict on the first cause of action. (Record No. 11.)
10. Verdict on the second cause of action. (Record No. 12.)
11. Plaintiff's Motion for Substitution of Plaintiff and for Judgment Upon Verdict. (Portion of Record No. 13.)

12. Defendants' Objection to Substitution of Plaintiff and Objection to Entry of Judgment Upon the Verdict. (Record No. 14.)

13. Minute Entry of October 10, 1955. (Record No. 15.)

14. Civil Docket Entry of October 10, 1955. (Record No. 16.)

15. Defendants' Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial. (Record No. 17.)

16. Minute Entry of November 7, 1955. (Record No. 18.)

17. Minute Entry of December 16, 1955. (Record No. 19.)

18. Notice of Appeal. (Record No. 20.)

19. Reporter's Transcript of Proceedings. (Record No. 21.)

20. Bond for Costs on Appeal. (Record No. 22.)

21. Appellants' Designation, Amended Designation and Supplemental Amended Designation of Contents of Record on Appeal. (Record No. 23.)

22. Order Extending Time to File Record on Appeal and Docket Appeal. (Record No. 24.)

23. All exhibits admitted in evidence.

Dated February 7, 1956.

SNELL & WILMER,

By /s/ MARK WILMER,

/s/ JAMES H. O'CONNOR,

Attorneys for Appellants.

Service of copy acknowledged.

[Endorsed]: Filed February 9, 1956.

No. 15033

IN THE
United States Court of Appeals

For the Ninth Circuit

1956 TERM

GILBERT RIPKA and WILSON
BROTHERS TRUCK LINES, INC., a
corporation,

Appellants,

vs.

CHARLES CREHORE, General Admin-
istrator of the Estate of Herbert Noah
Sanders and Delphia F. Sanders,

Appellee.

*Appeal from the
United States Dis-
trict Court for the
District of Ari-
zona.*

BRIEF OF APPELLANTS

SNELL & WILMER

Attorneys for Appellants

FILED

MAY -9 1956

INDEX

	PAGE
ARGUMENT	14
Part One	15
Part Two	25
CONCISE STATEMENT OF THE CASE	3
CONCLUSION	32
SPECIFICATIONS OF ERROR	7
I	7
II, III	10
IV, V, VI, VII	11
STATEMENT OF JURISDICTION	1
SUMMARY OF ARGUMENT	12

CITATIONS

Cases

<i>Arizona Binghamton Copper Co. vs. Dickson</i> , 195 Pac. 538, 22 Ariz. 163, 178.....	25
<i>Börs vs. Preston</i> , 111 U.S. 252, 28 L. ed. 419.....	2
<i>Brabham vs. State of Mississippi</i> , 96 F. 2d 210 (Fifth Circuit)	30
<i>Bucher vs. Kraus</i> , 200 F 2d 576, (Seventh Circuit).....	30
<i>Cobbel vs. Crawford</i> , 120 S.W. 2d 1085.....	19
<i>Cochran vs. Meacham</i> , 159 P. 2d 302.....	22
<i>Fenimore vs. Youngs</i> , 26 S.W. 2d 195.....	20
<i>Ford Motor Co. vs. Mahone</i> , 205 F. 2d 267, (Fourth Circuit)	30
<i>Frazier vs. Terrill</i> , 175 P. 2d 438, 65 Ariz. 131.....	24

Cases (Continued)

	PAGE
<i>Friedman vs. McHugh</i> , 168 F. 2d 350.....	23
<i>Home Owners' Loan Corp. vs. City of Phoenix</i> , 77 P. 2d 818, 51 Ariz. 455.....	23
<i>In re Hayer's Estate</i> , 11 N.W. 2d 592, 233 Ia. 1343.....	23
<i>In re Williams Estate</i> , 173 Pac. 790.....	21
<i>Industrial Commission vs. School District No. 48</i> , 108 P. 2d 1004, 56 Ariz. 476.....	23
<i>Jones vs. Weaver</i> , 123 F. 2d 403 (Ninth Circuit).....	25
<i>Lambright vs. Quick</i> , 214 S.W. 2d 697.....	19
<i>Little vs. Gavin</i> , 12 So. 2d 549.....	18
<i>Mansfield etc. vs. Swan</i> , 111 U.S. 379, 28 L. ed. 462.....	2
<i>McNutt vs. General Motors Acceptance Corporation</i> , 298 U.S. 178, 80 L. ed. 1135, 56 S. Ct. 780.....	2
<i>National Surety Co. vs. Conway</i> , 33 P. 2d 276, 43 Ariz. 480	23
<i>Naught vs. Struble</i> , 139 P. 2d 456, 148 A.L.R. 269, 275.....	16
<i>Nierbo Co. vs. Bethlehem Shipbuilding Co.</i> , 308 U.S. 165, 84 L. ed. 167, 60 S. Ct. 153.....	2
<i>Rowland vs. McBride</i> , 281 Pac. 207, 35 Ariz. 511.....	23
<i>State ex rel McCabe vs. District Court</i> , 76 P. 2d 634, 106 Mont. 272.....	23
<i>Southern Pacific Co. vs. Guthrie</i> , 180 F. 2d 295, id. 186 F. 2d 928.....	30
<i>So. Pac. Ry. Co. vs. Gastelum</i> , 297 Pac. 875, 38 Ariz. 127.....	25
<i>Tolivar vs. Lombardo</i> , 88 S.W. 2d 733.....	21
<i>Treinies vs. Sunshine Mining Co.</i> , 308 U. S. 66, 84 L. ed. 85, 60 S. Ct. 44.....	2

Cases (Continued)

	PAGE
<i>Trowbridge vs. Abrasive Co.</i> , 190 F. 2d 825 (Third Circuit)	31
<i>United States vs. Jefferson Electric Mfg. Co.</i> , 291 U.S. 386, 78 L. ed. 860, 54 S. Ct. 443.....	24
<i>U. S. vs. State of Arizona</i> , 295 U.S. 174, 79 L. ed. 1371, 55 S. Ct. 666.....	24
<i>Virginian Ry. Co. vs. Armentrout</i> , 166 F. 2d 400 (Fourth Circuit)	30
<i>Western Truck Lines vs. Berry</i> , 78 P. 2d 997, 52 Ariz. 38, 48	25
<i>Willis vs. Pinkard</i> , 52 S.W. 626.....	20

United States Statutes

28 U.S.C.A., Sec. 9.....	2
28 U.S.C., 1291.....	3
28 U.S.C., 1332.....	3

Arizona Revised Statutes

§ 12-612.....	13, 16
§ 14-441.....	15
§ 14-442.....	15
§ 14-443.....	12, 13, 16
§ 14-444.....	13, 16

Treatises

2 Bancrofts Probate Practice.....	16
-----------------------------------	----

No. 15033

IN THE

United States Court of Appeals

For the Ninth Circuit

1956 TERM

GILBERT RIPKA and WILSON
BROTHERS TRUCK LINES, INC., a
corporation,

Appellants,

vs.

CHARLES CREHORE, General Admin-
istrator of the Estate of Herbert Noah
Sanders and Delphia F. Sanders,

Appellee.

*Appeal from the
United States Dis-
trict Court for the
District of Ari-
zona.*

BRIEF OF APPELLANTS

GILBERT RIPKA and WILSON BROTHERS
TRUCK LINES, INC., A CORPORATION

STATEMENT OF JURISDICTION

At the outset a serious question of federal jurisdiction arises. While the amended complaint alleges the plaintiff, Wanek, to be a citizen of Arizona this fact is put in issue by the answer of the defendant Ripka. No proof whatever was offered as to his citizenship. Indeed, chief counsel for Mr. Wanek, Mr. Palmquist, made the startling statement in open court, (T.R. 72) "I don't even know who this Wanek is; * * *" Just how he came by his employment in the matter remains vague in the record.

Be that as it may, as to Ripka the cause must be dismissed.

McNutt vs. General Motors Acceptance Corporation, 298 U. S. 178, 80 L. ed. 1135, 56 S. Ct. 780

As to Wilson Brothers a more serious question exists. Impliedly, in its answer this defendant admits the citizenship of Wanek. But jurisdiction cannot be conferred by consent or waiver; the power to confer jurisdiction by consent of the litigants does not exist. *Nierbo Co. vs. Bethlehem Shipbuilding Co.*, 308 U. S. 165, 84 L. ed. 167, 60 S. Ct. 153. A federal court must in every case and at every stage of the proceedings satisfy itself of its own jurisdiction, which duty is imposed upon it by an act of Congress. 28 U.S.C.A. Sec. 9.

"In cases of which the Circuit Court may take cognizance only by reason of the citizenship of the parties, this court, as its decisions indicate, has, except under special circumstances, declined to express any opinion upon the merits, on appeal or writ of error, where the record does not affirmatively show jurisdiction in the court below; this, because the courts of the Union, being courts of limited jurisdiction, the presumption is, in every stage of the cause, that it is without their jurisdiction, unless the contrary appears from the record."

Börs vs. Preston, 111 U. S. 252, 28 L. ed. 419

Mansfield etc. vs. Swan, 111 U. S. 379, 28 L. ed. 462

Treinies vs. Sunshine Mining Co., 308 U. S. 66, 84 L. ed. 85, 60 S. Ct. 44

Mr. Wanek made no appearance on the trial and when his counsel disclaimed even knowledge as to who he was it became the duty of the trial court of its own motion, to ascertain whether in fact it had jurisdiction. The citizenship of Mr. Crehore likewise, does not appear of record so the jurisdiction of both the District Court and this Court remains in doubt, and since the presumption is against jurisdiction the cases should be dismissed, plaintiff having failed to carry the burden of asserting jurisdiction at all stages of the litigation.

Without waiving (which we couldn't do anyway) the fore-

going, we turn to the jurisdictional statement, as if proof had been made of diversity of citizenship jurisdiction.

Ralph Wanek, as Administrator of the Estates of Herbert Noah Sanders and Delphia F. Sanders, deceased, brought these actions for damages to the said two estates for the alleged wrongful deaths of Herbert Noah Sanders and Delphia F. Sanders. The amended complaint set out that said plaintiff is a citizen of the State of Arizona, that defendant Ripka is a citizen of the State of Indiana, and that defendant Wilson Brothers Truck Lines, Inc. is a corporation and a citizen of the state of Missouri. The amended complaint claimed negligence by defendants in the operation of a motor vehicle proximately causing the death of these two persons. It is alleged the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars. The jurisdiction of the District Court therefore under the pleadings arose under the provisions of 28 U.S.C., Sec. 1332, diversity of citizenship in a controversy involving values in excess of \$3,000. (T.R. 3 et seq.)

The cause was tried upon the issues as made by the pleadings, generally alleging and denying negligence on the part of the parties. The jury returned a verdict in favor of the plaintiff administrator as to each estate and judgment was entered thereon October 10, 1955. (T.R. 33, 34) The defendants moved on October 18, 1955 for judgment notwithstanding the verdicts or in the alternative for a new trial. These motions were denied December 16, 1955. (T.R. 42) Defendants Notice of Appeal to this Court was filed December 29, 1955. (T.R. 42)

The jurisdiction of the Court of Appeals rests upon 28 U.S.C. 1291.

CONCISE STATEMENT OF THE CASE

Plaintiff, Wanek, sued as general administrator of the estates of Herbert Noah Sanders, deceased, and Delphia F. Sanders, deceased, for damages for wrongful death of each decedent claimed to have resulted from the negligence of defendant Ripka, acting as

agent of defendant Wilson Brothers Truck Lines, Inc. Such agency was admitted, negligence on the part of defendants was denied and defendants charged that plaintiff's intestates operated their motor vehicle over the center line of the highway, thereby causing their own deaths.

The accident occurred about three o'clock in the morning about seven miles west of Flagstaff, Arizona, on U. S. Highway 66. Mr. and Mrs. Sanders were killed and their three children injured in varying degrees in the collision occurring when either defendants' truck or plaintiff's Hudson automobile crossed over the center line of the highway as the vehicles were meeting, plaintiff's intestates traveling westerly and defendants in an easterly direction.

On the trial of the action at Prescott, Arizona, the jury returned a plaintiff's verdict, finding damages in the Herbert Noah Sanders' estate case in the amount of \$65,000 and \$18,750 in the Delphia F. Sanders' estate case. The two causes of action were sued upon in one complaint and the cases were tried as one case. Plaintiff offered on the trial in support of his allegation as to his capacity to maintain the action a certified copy of Letters of Special Administration of the two estates issued to him by the Clerk of the Superior Court of Coconino County, Arizona. Defendants objected on the grounds first, plaintiff sued as a general administrator; secondly, that a special administrator under Arizona law could not maintain such an action and thirdly, that the order of appointment, under Arizona law, is the measure of authority and there was no showing that such an order had ever been entered or that it authorized the instant actions. The objection was overruled.

The evidence as to liability was in sharp dispute, plaintiff relying entirely upon physical evidence claimed to show defendants crossed over the center line, while defendant Ripka testified unequivocally that plaintiff's vehicle as it approached suddenly crossed over the line and into his front corner.

The deceased Herbert Noah Sanders was forty-six years of age with a life expectancy of 23.83 years. He was unemployed at the time and had worked as a construction worker on roads, as a machinist and for the Naval Shipyard at Hunters Point, California.

Delphia F. Sanders was his wife, age thirty-nine years with an expectancy of 28.90 years. She had no earning history other than some casual employment as a baby sitter, at which she earned on occasions \$10 to \$11 per week.

The family consisted of the father and mother and three daughters, seventeen, thirteen and seven. They had been to Las Cruces, New Mexico, looking for work and were returning to California driving a 1949 Hudson pulling a two-wheel trailer loaded with household goods, etc. Mr. Sanders was driving. They had stopped at about twelve o'clock that night at a place called White Elephant Lodge where Mr. Sanders had some coffee and bought some No Doz pills. Such a box was found in the Sanders' car after the accident with only one tablet left in it.

The total accumulations of the family consisted of about \$2,400 in cash carried with them, a 1949 Hudson car and two-wheel trailer, household and personal effects of the family. The plaintiff offered no evidence as to how present value or worth of a sum to be received in the future should be computed.

There are three questions presented for determination:

1. The plaintiff alleged in the amended complaint (T.R. 3 et seq.) "Plaintiff* * * is, pursuant to and under the laws of the state of Arizona, the duly appointed, qualified and acting administrator of the Estate of Herbert Noah Sanders, deceased, and of the Estate of Delphia F. Sanders, deceased." By appropriate pleadings defendants put this matter in issue. (T.R. 8, 13) Upon the trial plaintiff tendered a certified copy of letters of special administration in each estate. (T.R. 157, 158) Objection was made to the offer upon two grounds. First, the suit was alleged to be by a general administrator and hence the special letters were

inadmissible as being immaterial. Second, a special administrator has no authority or right to maintain an action for wrongful death under the laws of the state of Arizona (T.R. 157, 158) in any event without the order of Court appointing him conferring such power. The objection was overruled and the Special Letters were admitted as plaintiff's Exhibit 21 in Evidence.

At the conclusion of the plaintiff's case defendants moved to dismiss the cause or for a directed verdict because of failure of proof as to capacity to maintain the action and upon the further ground that the statutes of the state of Arizona require that the order of appointment of a special administrator shall specify what the powers of a special administrator shall be and, no proof having been offered as to any order authorizing plaintiff to bring the actions, the plaintiff had failed to sustain the burden of proof as to this vital fact. (T.R. 302 et seq.) These motions were denied and were renewed and again denied at the close of all the evidence. (T.R. 421, 422)

Subsequent to the verdicts in favor of the plaintiff, a written motion was filed to substitute Charles Crehore, general administrator of the two estates, as plaintiff and for judgment in his favor upon the verdicts. (T.R. 29 et seq.) Written objections were filed upon the grounds heretofore stated and upon the further ground that a federal district court is without probate jurisdiction and that accordingly, until the state court having jurisdiction had ordered the transfer of the causes of action and wound up the affairs of the special administrator, such order requested would be void. (T.R. 32) The objections were overruled and judgment ordered in favor of the general administrator. (T.R. 34)

By written motion for judgment notwithstanding the verdict or for a new trial, defendants again challenged the verdict and judgment for the foregoing reasons (T.R. 35) which motions were denied. (T.R. 42)

2. The plaintiff failed to offer any evidence by which the jury could determine the "present worth" or "present value" of

the probable accumulations of the decedents. This is a matter for expert testimony without which the plaintiff's case in a wrongful death case falls. This point was raised by motion at the close of plaintiff's case (T.R. 303) and at the close of all the evidence (T.R. 421, 422)

3. The verdicts and each of them, are the result of passion, prejudice or sympathy in that there was no evidence from which the jury on any conceivable theory could have found that the marital community of Mr. and Mrs. Sanders would have accumulated an amount which the present worth of \$83,750 would represent, the aggregate amount of the two verdicts. Mr. Sanders was unemployed, Mrs. Sanders was a housewife with no earning power except as a baby sitter or housekeeper. The total accumulations of the community did not exceed approximately \$4,000. Mr. Sanders was forty-six and Mrs. Sanders thirty-nine.

This question was raised by defendants' motion for a new trial. (T.R. 35 et seq.)

SPECIFICATIONS OF ERROR

I

The Court erred in overruling defendants' objections to the admission in evidence of plaintiff's Exhibit 21 in Evidence for the reasons:

(a) The suits were instituted by the plaintiff as a general administrator and the certified copy of Letters of Administration was of Special Letters of Administration;

(b) There was no showing as to what powers the court granted the Special Administrator in appointing him and under the laws of the state of Arizona the order of appointment confers the powers which may be enjoyed by a special administrator;

(c) Under the laws of the State of Arizona a special administrator has no authority to bring or prosecute an action for wrongful death. (T.R. 157, 158):

"The Court: You may proceed.

"Mr. Scoville: Your Honor, at this time I would like to offer a certified copy of the letters of administration of Ralph Wanek, of the estates of Herbert N. Sanders and Delphia F. Sanders, out of the Superior Court of the State of Arizona in and for the County of Coconino, certified as having been issued to Mr. Wanek on July 12, 1954; and letters of special administration in cause 2408 of that Court and attested to by the clerk of that Court on August 3, 1955, as having been and still being in full force and effect.

"Mr. Wilmer: It was not my recollection that the suit was as special administrator, Your Honor.

"Mr. Scoville: The suit simply states, I believe, he is the administrator. It doesn't designate him as being general or special. Under the laws of the State of Arizona the special has all the powers of a general.

"Mr. Wilmer: If it please the Court, we object on the ground the action is not brought by a special administrator and hence the letters or purported letters of special administration would be immaterial; secondly, on the ground the special administrator would have no jurisdiction in prosecuting this action.

"Mr. Scoville: Under the laws of Arizona a special administrator may prosecute claims and/or sue or be sued.

"Mr. Wilmer: There is a specific statute on wrongful deaths, Your Honor, that does not apply to a special administrator.

"The Court: It will be received. I will hear you on your other points in regard to it at another time.

"Mr. Wilmer: Very well."

IN THE SUPERIOR COURT
of Coconino County, State of Arizona

In the Matter of the Estates of HERBERT N. SANDERS and
DELPHIA F. SANDERS, Deceased.

No. 2408

LETTERS OF SPECIAL ADMINISTRATION

State of Arizona, }
County of Coconino } ss.

In accordance with an order made by the Superior Court on the 12th day of July, A. D. 1954, Ralph Wanek is hereby appointed Special Administrator of the Estate of Herbert N. Sanders and Delphia F. Sanders, deceased.

WITNESS Mary P. Lewis, Clerk of the Superior Court of Coconino County, State of Arizona, with the Seal of said Court affixed, this 12th day of July, A. D. 1954.

(s) Mary P. Lewis
Clerk.

State of Arizona, }
County of Coconino } ss.

I do solemnly swear that I will support the Constitution of the United States, and the Constitution and Laws of the State of Arizona, and that I will faithfully perform, according to law, the duties of Special Administrator of the Estate of Herbert N. Sanders, and Delphia F. Sanders, deceased.

(s) Ralph Wanek

Subscribed and sworn to before me this 12th day of July, A. D. 1954.

(SEAL)

(s) Mary P. Lewis

II

The Court erred in denying defendants' motion for a dismissal of the actions or for a directed verdict in favor of defendants made at the close of the plaintiff's case and at the close of the entire case for the reasons:

(a) Plaintiff has instituted the actions as a general administrator and the proof, Plaintiff's Exhibit 21, showed no such appointment but only his appointment as a special administrator;

(b) The only authority which a special administrator has under the laws of the state of Arizona is that expressly conferred by the order appointing him. The tendered exhibit did not set forth these powers and there was no other evidence offered or received which showed any authority to bring or maintain the actions;

(c) A special administrator under the laws of Arizona can have no capacity to bring or maintain an action for wrongful death and the court appointing such special administrator has no power to confer such right.

III

The Court erred in denying defendants' objections to the substitution of Charles Crehore, general administrator of each estate, as plaintiff for the reasons:

(a) Wanek as special administrator had no capacity to bring or maintain the actions for the reasons (1) the laws of Arizona deny such authority to a special administrator; (2) in any event, only the authority conferred in the order of appointment may be exercised and there was no showing such authority was conferred. Hence the proceedings resulting in the verdicts to which Crehore sought substitution as plaintiff were a nullity and there was nothing to which he might be substituted;

(b) If Wanek as special administrator had authority to bring and maintain the actions the jurisdiction to divest him of control thereof and to transfer such control to a general adminis-

trator resided in the state courts of Arizona and did not reside in the federal court. The order substituting Crehore for Wanek in effect amounts to the federal court exercising state court probate jurisdiction and authority.

IV

The Court erred in denying defendants' motion for judgment notwithstanding the verdict or in the alternative for a new trial for the reasons:

(a) Wanek as special administrator had no authority to bring or maintain the actions for the reasons stated in the foregoing specifications of error;

(b) The federal court had no jurisdiction to authorize the transfer of the causes of action from the special administrator to the general administrator.

V

The Court erred in refusing to grant defendants' motion for a new trial for the reason the excessiveness of the two verdicts clearly demonstrated that the jury was motivated by passion, prejudice or sympathy in reaching its verdict and hence its decision on the question of liability was vitiated as being so infected.

VI

The Court erred in denying defendants' motion for a new trial for the reason there was no evidence in the record from which the jury could have possibly computed that the present value of the probable accumulations of Herbert Noah Sanders, had he lived, was \$65,000 or that the present value of the probable accumulations of Delphia F. Sanders, had she lived, was \$18,750.

VII

The Court erred in denying defendants' motion for a new trial for the reason there was no expert testimony as to the method of computing the present value of a sum of money to be received in the future and, since this is a matter upon which expert testimony

must be offered and is not a matter within the knowledge of a lay person, the jury was left to speculate as to how this finding should be achieved.

SUMMARY OF ARGUMENT

Plaintiff sued as a general administrator. His proof showed his only authority was some authority as a special administrator. The laws of Arizona require that the order of appointment spell out the authority of a special administrator (14-442 A.R.S.) and no order authorizing the bringing and prosecution of these actions was produced. Despite the fact the accident occurred July 10, 1954, plaintiff was still claiming to act under his special authority in August of 1955.

The laws of Arizona limit the power of a special administrator to "collect and preserve for the executor or administrator the *personal property of the decedent*, take charge and management of, enter upon and preserve from damage, waste and injury, the real property, and *for such purposes* may commence and maintain or defend, actions and proceedings as an administrator." (14-443 A.R.S.) (emphasis supplied) (Note: all applicable statutes will be set out totidem verbis in the appendix). The statute having specified for what purposes an action may be maintained by a special administrator, neither the Arizona court nor the Federal District Court has any power or jurisdiction to enlarge that authority. Certainly a federal court cannot in effect issue an order required by Arizona law to be issued by the state court authorizing the special administrator to sue in default of such order by the state court. Under the laws of Arizona while the action for wrongful death is brought in the name of the estate the proceeds are not an asset of the estate or a part of it. Manifestly, since the cause of action for wrongful death could not arise during the life of the decedent it could not constitute personal property of the decedent. Therefore, if the foregoing language of Section 14-443 be given the broadest construction and the authority to bring actions of a special administration be read to include the collection and preservation of the personal property of the decedent

as well as to preserve the real property (which is not a legitimate extension of its language) nonetheless such authority to prosecute a wrongful death action which arises after the death of a decedent cannot be read into the statute.

The "personal representative" who may bring the action contemplated by Section 12-612 A.R.S. is plainly not a special administrator, for a special administrator is generally held to be an agency of the court, in the nature of a receiver rather than a representative of the decedent and his estate. It is for this reason he is not liable in an action by a creditor on a claim against the decedent (14-443 A.R.S.) and he is directed to account "in like manner as administrators." (14-444 A.R.S.)

In addition, since both 14-443 and 12-612 originate with the Revised Statutes of 1901, the special statute, specifying for what purposes a special administrator might sue, being a special statute delimiting the powers of a probate functionary, would control.

With respect to point 2, failure of the plaintiff to introduce expert evidence as to the present value of a sum to be received in the future, this is a subject of expert testimony upon which lay persons are not usually informed. Therefore failure to offer such proof constitutes a failure upon the part of plaintiff to carry his burden of proof.

Finally, under the laws of Arizona the measure of damages for wrongful death is the present value of the probable accumulations of the decedent. This eliminates all questions of dependency and support lost, requires that effect be given to income and like taxes, usual living costs, etc. While, necessarily, exact proof cannot be made of what this would be, there must be some basis in the evidence for the sum allowed by the jury. Since Mrs. Sanders showed no earning power at all we must conclude the jury apportioned to her as community property a part of Mr. Sanders' earnings. Necessarily too, the jury must have concluded Mrs. Sanders would have predeceased Mr. Sanders by substantially a considerable time or they would have divided the

award equally. We find then that if we take the present award of \$83,750 and use only 3% interest, un compounded, that the jury concluded Mr. Sanders, at the expiration of his 23 year life expectancy would have earned and saved and then possessed to pass on to his heirs, (giving effect to the community interest of Mrs. Sanders,) \$141,514.50. If we take their *total accumulations* and assume that Mr. Sanders would *duplicate such accumulations*, not in the next twenty-three years of his life but would earn and save a like amount after living expenses and income taxes *in every year of the twenty-three remaining years of life expectancy*, we still fall almost \$50,000 short of the total allowed by the jury!

Here the evidence as to liability was in sharp conflict. The few physical facts which were reasonably clear and certain indicated defendants were not liable. There was no reasonable basis for concluding the jury paid any more attention to the evidence and instructions on liability than they did to the evidence and instructions on the issue of damages and the measure thereof. The excessive verdict, without possible support in the law or evidence requires defendants, in the interest of justice, be awarded a new trial.

ARGUMENT

We recognize this Court is not going to try again the issue of liability which the jury has resolved against defendants. We feel justified, however, in briefly outlining the facts in relation thereto for the reason it is only where the issue as to liability is sharply contested that the remedy of remittitur is ineffectual. In other words, if defendants are plainly liable then the excessive verdict can be corrected by the court. However, passion, prejudice and sympathy when rampant in the minds of jurors, like a carcinoma in its final stages, are not found confined to one issue but infect the entire case as the cancerous cells poison every gland and organ of the unhappy victim's body. We believe, unless the measure of damages long recognized as the law in the state of Arizona is to be disregarded by this Court, plainly the verdicts of the jury as to the amount of damages must be found so excessive and so

at variance with plaintiff's own evidence that passion, prejudice and sympathy on the part of the jurors must be found.

We will divide our argument into two parts. The first will cover the question of the jurisdiction of the District Court to proceed with the action when it developed upon the trial that the purported plaintiff was only a special administrator and hence without capacity to maintain the action. The second part will be devoted to the question as to the effect of the apparent sympathy or prejudice and passion of the trial jury.

PART ONE

A review of the substance of the basic statutes involved and of basic principles of probate law will set a fitting backdrop for the reasons why we believe jurisdiction of the trial court failed when it became apparent the plaintiff had only the capacity of a special administrator.

Section 14-441 A.R.S. (Appendix p. 33) in substance provides for the appointment of a special administrator when:

- a. There is delay in granting letters testamentary or of administration from any cause;
- b. Letters are granted irregularly;
- c. A sufficient bond is not filed;
- d. When no application is made for letters;
- e. When an executor or administrator dies or is removed;

to take charge of *the estate of the decedent*.

Section 14-442 A.R.S. (Appendix p. 33) provides that the appointment may be made at any time without notice "by entry upon the minutes of the court, *specifying the powers to be exercised by the special administrator*." (emphasis supplied) The clerk is required to issue letters to such person "in conformity with the order" i.e., specifying the powers granted by the court. The statute requires a bond for the faithful performance of his duties and then provides "he shall take the oath required of administrators."

Section 14-443 A.R.S. (Appendix p. 34) is decisive. It enumerates the duties of the special administrator. He shall:

(a) Collect and preserve for the executor or administrator *or the personal property of the decedent*;

(b) Take charge and management of, enter upon and preserve from damage, waste and injury, the real property;

(c) For such purposes he may commence and maintain or defend, actions and proceedings *as an administrator*.

Section 14-444 A.R.S. (Appendix p. 34) terminates the powers of a special administrator when letters testamentary or of administration have issued and provides the executor or administrator may prosecute to final judgment an action commenced by the special administrator.

Section 12-612 A.R.S. (Appendix pp. 32, 33) governs the parties to a wrongful death action. It provides, so far as here material, that the action shall be brought by and in the name of the personal representative of the deceased person. The term "personal representative" is defined to include any person "to whom letters testamentary or of administration are granted by competent authority. * * *"

Turning now to some basic principles of probate law:

2 *Bancrofts Probate Practice*, Section 373, as approved in *Naught vs. Struble*, 139 P. 2d 456, 148 A.L.R. 269, 275, states one of these rules as follows:

"The first impression conveyed by such provisions is that the powers of a special administrator may go to any extent with which the court sees fit to invest him. Such, however, is not the rule. *By reason of the nature of the office and specific enumeration of powers*, the distinction between general and special administration must be maintained, and the "other" powers with which the court may invest a special administrator *are only such as are incidental and in the line of the enumerated powers*. He may not be given generally the powers of an executor or administrator, such as the power to allow or pay claims. The powers specifically conferred upon a special ad-

ministrator by the statute are exclusive to such an extent that the court whose officer he is may not require him to go beyond the fair import of the statutory provisions, *and any acts done by him beyond the scope of the authority conferred are void.*' " (Emphasis supplied)

The foregoing case from Idaho shows the general similarity of the statutes of Idaho and Arizona in relation to special administrators. In commenting upon the Idaho statute authorizing such appointment and following our statute almost word for word as to how the appointment is to be made, the court said:

"* * * * Section 15-353, ICA, provides: 'The appointment may be made at any time and without notice, and must be made by entry upon the minutes of the court, specifying the powers to be exercised by the administrator; upon such order being entered, and after the person appointed has given bond, the clerk must issue letters of administration to such person in conformity with the order.'

"It was in conformity with this section that appellant's letters were issued as such special administrator and they recite therein the powers granted him by the probate court as follows: 'To collect and preserve for the administrator all goods, chattels, debts and effects of the decedent, all incomes, rents, issues and profits, claims and demands of the estate, and particularly to arrange for the funeral expenses and expenses of the last illness of said deceased, and generally to exercise such powers of a general administrator as may be provided by law.'

"It cannot be concluded that the probate court in the grant of powers enumerated in the letters, intended to, or did, grant powers to appellant as such special administrator not authorized by our statutes relating to such matters. The powers of a special administrator are limited to such powers as are granted him by statute. (2 Bancrofts Probate Practice, page 705, Section 373.) 'It is the policy of the law to keep the administration of estates within the hands of regularly appointed administrators, and to rely upon special administrators only in cases of emergency and for a limited time. Statutory provisions speaking of powers, duties and liabilities of executors and administrators, are not applicable, as a general rule, to special administrators.' (2 Bancrofts Probate Practice, page 701, Section 371.)"

In *Little vs. Gavin*, 12 So. 2d 549, the Supreme Court of Alabama said:

"The right of the special administrator to maintain the bill is dealt with by statute and decisions. Code 1940, T. 61, § § 89 and 90, read as follows:

" ' § 89. The judge of probate may, in any contest respecting the validity of a will, or for the purpose of collecting the goods of a deceased, or in any other case in which it is necessary, appoint a special administrator, authorizing the collection and preservation by him of the goods of the deceased until letters testamentary or of administration have been duly issued.

" ' § 90. Every such special administrator has authority to collect the goods and chattels of the estate, and debts of the deceased, give receipts for moneys collected, satisfy liens and mortgages paid to him, and to secure and preserve such goods and chattels at such expense as may be deemed reasonable by the probate court; *and for such purposes he may maintain suits as administrator.*' (Emphasis supplied by the court)

"In *Ex parte Kelly*, 243 Ala. 184, 8 So. 2d 855, 865, it is said: ' * * * that the authority of the probate court, in the appointment of a special administrator, is fixed and limited by statute. It is only that the appointment is for special administrator for the *collection and preservation of the goods of the deceased*, and not for the purpose of the administration of the estate. (Code 1940, T. 61, § 89).' (Parenthesis supplied.)"

* * * * *

" 'It is established by this court in *Arendale et al. v. Johnson et al.*, 206 Ala. 245, 89 So. 603, 604, that: "A temporary administrator, or an administrator ad colligendum, as he is usually called, 'is the mere agent, or officer of the court, to collect and preserve the goods of the deceased, until some one is clothed with authority to administer them.' *Flora v. Mennice*, 12 Ala. 836. In that case it was expressly held that he could be removed at any time. Other than this preliminary duty of collection and preservation, he has nothing to do with the administration of the estate, as contemplated by sections 2519 and 2520 (Code 1940, Tit. 61, § § 80, 81)."

" 'In *Mitchell v. Parker*, 227 Ala. 676, 151 So. 842, 843, the court said: "Special" administrators must find their author-

ity in the law which governs his situation and in the orders of the probate court. "He is the agent or officer of the probate court. *Flora v. Mennice*, 12 Ala. 836. His authority as defined by Section 5749, Code (Code 1940, Tit. 61, § 90), is to collect and receive goods, chattels, and debts due the estate, secure and preserve them at such expense as may deemed reasonable by the probate court. He has no authority to pay debts nor receive the presentation of claims. *Erwin v. Branch Bank*, 14 Ala. 307."

"The authority of the special administrator being fixed by statute, the same can neither be restricted nor enlarged by the court appointing him. *Underhill v. Mobile Fire Department Ins. Co.*, 67 Ala. 45, 50. The law fixes the duty of the special administrator after the appointment and not the judge who makes the appointment. *Wolffe v. Eberlein*, 74 Ala. 99, 107, 49 Am. Rep. 809. * * *

The Court of Appeals of Texas thus states another rule in *Cobbel vs. Crawford*, 120 S.W. 2d 1085:

"Undoubtedly the petition was fatally defective in failing to allege that the temporary administrator had been authorized or ordered to pay plaintiff's claim. Ordinarily this is the duty of the permanent administrator or the executor, as the case may be. The authority of the temporary administrator is measured by the order of appointment. *His powers are limited and his acts not expressly authorized by the grant of power are void.* Simpkins, Administration of Estates, Sect. 84. *The statutes affecting the powers of a temporary administrator are construed strictly, and he is confined to the powers clearly indicated.* *Cruse v. O'Gwin*, 48 Tex. Civ. App. 48, 106 S.W. 757; *Willis & Bro. v. Pinkard*, Tex. Civ. App., 52 S.W. 626." (Emphasis supplied)

Another Court of Appeals of that State in *Lambright vs. Quick*, 214 S.W. 2d 697 states the rule:

"It is the established law in this State that a temporary administrator has only such limited powers as are conferred upon him by the order of the court appointing him, *and that the mere allegation that appellee was the temporary administrator of the Lynn estate does not state any authority on his part to approve appellant's claim for services rendered the estate and the*

trial court did not, we think, abuse its discretion in entering its order dismissing the suit for lack of jurisdiction. *Fenimore v. Youngs et al.*, 119 Tex. Com. App. 159, 26 S.W. 2d 195; *Cobbel v. Crawford et al.*, Tex. Civ. App., 120 S.W. 2d 1085; *Tolivar v. Lombardo*, Tex. Civ. App., 88 S.W. 2d 733." (Emphasis supplied)

In a leading case from that jurisdiction as to the general right of a special administrator to engage in litigation, *Willis vs. Pinkard*, 52 S.W. 626, the court said:

" * * * excellent reasons exist why the powers of a temporary administrator should not be extended beyond those clearly intended to be conferred by the court appointing him. The appointment may be made upon the court's own motion, without notice, and before the estate, and the condition of it, has been otherwise brought within the cognizance of the probate judge. No party at interest has the opportunity to protest, whatever objection might be urged to the character or capacity of the individual appointed. * * * * * The contention that the language of the order conferring the powers in this instance necessarily include the power to sue for possession, we do not consider tenable. The words 'take charge of and care for' cannot be held to confer the power to involve the estate in litigation, and liability for costs and attorney's fees. Nothing short of the emergency contemplated by the statute would authorize the court to appoint a temporary administrator in any case, and it cannot be successfully contended that the powers of a temporary administrator should be dangerously extended in the absence of all emergency. * * * * "

In *Fenimore vs. Youngs*, 26 S.W. 2d 195, an opinion by the Commission of Appeals adopted by the Texas Supreme Court, the court said:

"Article 3373, R.C.S. of Texas, 1925, authorizes the appointment of a temporary administrator with such limited powers as the circumstances of the case may require. Article 3374 provides that the order of appointment shall define the powers conferred. Clearly, under these two articles, *a temporary administrator only has such limited powers as the court appointing him may by order define, and the mere allegation that Fenimore is the temporary administrator of the estate of Ross*

Youngs, deceased, does not state any authority on his part to bring the suit, and the district court did not abuse his discretion in refusing a default judgment on such a petition. Willis v. Pinkard, 21 Tex. Civ. App. 423, 52 S.W. 626." (Emphasis supplied)

That a special administrator must affirmatively set up his authority appears clearly from *Tolivar vs. Lombardo*, 88 S.W. 2d 733:

"First, appellee's petition alleged that F. F. Tolivar was 'the duly qualified and acting temporary administrator, of the estate of C. R. Tolivar deceased'; there was no allegation of the extent of the powers conferred upon him by the court in his appointment as such temporary administrator. There was no allegation that, by his appointment, he was authorized to approve or reject the claim sued upon, or to defend this suit. These were special powers to be exercised by him only on the orders of the probate court. Without a specific grant of power, he had no authority to bind the estate by approving or rejecting these claims, nor could he defend this suit for the estate as temporary administrator. A temporary administrator has only such powers and duties as are conferred upon him by the order of appointment. No inference could be drawn from the allegations of appellee's petition that appellant, as temporary administrator, had authority to approve or reject these claims, or to defend this suit. The petition was bad on general demurrer and insufficient to support the judgment. Article 3373, Vernon's Ann. Civ. St.; article 3378, Vernon's Ann. Civ. St.; article 3379, Vernon's Ann. Civ. St.; *Allar Co. v. Roeser* (Tex. Civ. App.) 217 S.W. 442; *Youngs v. Youngs* (Tex. Com. App.) 26 S.W. (2d) 191; *Fenimore v. Youngs*, 119 Tex. 159, 26 S.W. (2d) 195; *Laas v. Seidel*, 95 Tex. 442, 443, 67 S.W. 1015."

The Supreme Court of Montana thus announced the rule in *In re Williams Estate*, 173 Pac. 790:

"It is idle to cite sections of the Code or decided cases which have to do with the duties and liabilities of a guardian, an executor, or a general administrator, for they have no application to a special administrator, whose duties, powers, and responsibilities are defined by sections 7470-7476, Revised Codes. His office is one specially created by statute with limited tenure

and limited powers. To determine whether a particular duty is imposed upon him, he has but to consult these seven sections of the Code, and, if the duty is imposed, it is there disclosed. If the statute is silent, it is so because the Legislature has withheld the duty. These sections have been construed to limit the functions of a special administrator to the exercise of such powers only as are 'necessary to collect and preserve the estate for the executor or administrator to be regularly appointed.' *State ex rel. Bartlett v. District Court*, 18 Mont. 481, 46 Pac. 261; *Ford's Estate*, 29 Mont. 283, 74 Pac. 736. The reason for the rule must be apparent to any one. The special administrator holds temporarily and may be called upon to relinquish his control any day. His authority ceases automatically upon the appointment and qualification of the executor or general administrator. Section 7475, Rev. Codes. To such an extent are the provisions of sections 7470-7476 exclusive, *that the court whose officer the special administrator is cannot require him to go beyond the fair import of their terms, and any acts done by him beyond the scope of the authority conferred are void.* *State ex rel. Bartlett v. District Court*, above." (Emphasis supplied)

We do not believe further citation of authority is required to demonstrate:

(a) A special administrator has no inherent authority; the statute as implemented by the court's order specifying his authority is the extent and measure of his authority and acts beyond his specified authority are void;

(b) Mere proof that one has been appointed a special administrator raises no presumption that the order of appointment grants him the power to do anything — certainly raises no presumption that the order of appointment goes beyond the statute specifying the duties and powers which may be granted a special administrator.

We respectfully represent to the Court that the express provisions of Arizona law stating what suits a special administrator may bring excludes all others and therefore clearly excludes a wrongful death action. Such an action is not an asset of the estate. Section 12-611 A.R.S. et seq. *Cochran vs. Meacham*, 159 P. 2d 302

(Ariz.); *Friedman vs. McHugh*, 168 F. 2d 350. It does not constitute "personal property of the decedent."

If it be argued that a special administrator is a "personal representative" within the meaning of Section 12-612 there are two answers.

First, it is apparent that the language of Section 12-612 intends a personal representative in the true sense of the word. The phrase "letters testamentary or of administration" indicate nothing else. A special administrator is an agency of the court, a conservator.

In re Hayer's Estate, 11 N.W. 2d 592, 233 Ia. 1343.

State ex rel McCabe vs. District Court, 76 P. 2d 634, 106 Mont. 272.

Secondly, by express terms of our statutes the court, in appointing the special administrator must, if the court desires to extend to the special administrator the authority to bring such an action (if we give the phrase the broadest meaning), by order authorize such action upon his part. The rule is firmly established in Arizona that statutes relating to the same subject matter are to be construed together and full effect given to each, if possible.

National Surety Co. vs. Conway, 33 P. 2d 276, 43 Ariz. 480;
Rowland vs. McBride, 281 Pac. 207, 35 Ariz. 511;

Home Owners' Loan Corp. vs. City of Phoenix, 77 P. 2d 818, 51 Ariz. 455;

Industrial Commission vs. School Dist. No. 48, 108 P. 2d 1004, 56 Ariz. 476.

The phrase "personal representative" was added to the provisions of the wrongful death statute in connection with the 1913 revision of the Arizona statutes. At that time the provisions of what is now Article 3, Title 14 "Special Administrators" had been a part of our statutes since the 1901 revision. It was carried forward and made a part of the 1913 revision unchanged and containing the requirement that the court, in appointing a special administrator must specify his powers. The conclusion, therefore, is inescapable if we are to reason logically that the

legislature intended (if it intended a special administrator might bring such an action) that such special administrator should be one appointed in accordance with the language it had written in the same revision, that is, with this power granted by the court if the court deemed it wise to permit such a special, temporary agent to so act.

"On the presumption that whenever the legislature enacts a provision it has in mind the previous statutes relating to the same subject matter, it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes and all should be construed together * * *"

Frazier vs. Terrill, 175 P. 2d 438, 65 Ariz. 131 (quoting from Section 5201, Sutherland's Statutory Construction)

A further principle of statutory construction steps in to remove any question but that the order appointing the special administrator must grant this express authority, if it is to be exercised by the special administrator. It is universally held that where there is a special statute specifically spelling out controls for a given situation, the special statute governs over the general:

"It is the general rule of construction that where there is a general statute dealing with a subject in comprehensive terms and another dealing with a part of the same subject in a more minute and definite manner, the two should be read together and harmonized if possible, so as to give full effect to the legislative intent. *Gideon v. St. Charles*, 16 Ariz. 435, 146 P. 925; *Arizona Eastern R. Co. v. Matthews*, 20 Ariz. 282, 180 P. 159, 7 A.L.R. 1149; 59 C.J. 1056. * * * *"

In *United States vs. Jefferson Electric Mfg. Co.*, 291 U.S. 386, 78 L. ed. 860, 54 S. Ct. 443 the United States Supreme Court laid down this rule:

"As a general rule where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is plainly shown."

See also *U. S. vs. State of Arizona*, 295 U.S. 174, 79 L. ed. 1371, 55 S. Ct. 666

We respectfully submit that whatever construction be given our statutes, escape cannot be had from the conclusion that Wanek had no authority to bring these actions. If he had no standing to bring the actions there was no diversity or other jurisdiction in the District Court — hence there was nothing for Crehore to be substituted to.

PART TWO

This relates to the failure of the plaintiff to offer any actuarial evidence as to the measure of damages and the resulting highly excessive verdict — a verdict which plainly reflects lack of understanding, and passion, prejudice or sympathy.

It is, of course, firmly settled in Arizona that the measure of damages in a case such as this is the present value of the probable accumulations of the deceased.

Jones vs. Weaver, 123 F. 2d 403 (Ninth Circuit)

Arizona Binghamton Copper Co. vs. Dickson, 195 Pac. 538, 22 Ariz. 163, 178

Western Truck Lines vs. Berry, 78 P. 2d 997, 52 Ariz. 38, 48
So. Pac. Ry. Co. vs. Gastelum, 297 Pac. 875, 38 Ariz. 127

Plaintiff requested an instruction to that effect (T.R. 26) and the court instructed the jury without objection by plaintiff that such was the rule. The court told the jury (T.R. 433 et seq.) that they were to consider the health, earning capacity, character of the deceased, and arrive at a sum equal to the present value of the probable accumulations of the deceased, defined present value as the worth now of money payable in the future determined or calculated on the basis of the highest rate of interest that can be had on money safely invested. He ruled out living expenses of the family and loss of support and maintenance of the children was also removed from the jury's consideration.

In other words, the court told the jury to calculate what the decedents would have saved and had to pass on to their estates

and then reduce that to an amount which if invested now at the highest rate money can be safely invested, would grow to the amount of the probable accumulations of the decedents.

And the jury concluded they would save and have on hand at their death close to \$150,000! This in the face of the fact a medical doctor testified he rejected Sanders for employment at White Sands because of a suspicion of tuberculosis — "it appeared to be tuberculosis and that he should seek medical care"; (T.R. 308) the decedent Delphia F. Sanders had no trade or profession and her only earning history was as earning on some occasions \$10 to \$11 weekly as a baby sitter (T.R. 292) Sanders himself was then unemployed (T.R. 277, 278) and had been working at odd jobs since October, 1953, (T.R. 278) and the total accumulations to the date of the accident were in the neighborhood of \$4,000. (T.R. 288)

It is true the daughter testified the chest condition according to family knowledge arose from a bad case of pneumonia when Sanders was young which left some scars on his lungs and that he had loaded the family and all of their possessions in the car and trailer for the sole purpose of returning to California to get his civil service records from Hunters Point Shipyard to prove this. (T.R. 280, 281) The likelihood of a man hauling his entire family and all his worldly goods back to California for the sole purpose of turning around and hauling them back is remote.

In addition, significantly, Sanders slept outside in the automobile the entire time the family was at Las Cruces despite the fact the landlady offered to put an additional bed in the two-room motel. (T.R. 327)

His past earning history was unimpressive. Coming to California in 1942 (T.R. 276) he first did construction and road work, worked as a millwright and in the naval shipyard at Hunters Point. His earnings there — his last regular employment, which ended in October 1953, were "about close to \$400 per month, I think." (T.R. 277, 278)

If we accept this guess as authentic, concede he would work at this rate of pay each year of his remaining life expectancy, live out his full life expectancy, spend nothing for food, clothing or any other purpose, pay no income taxes, lose no time in sickness and save every penny he earned, we still fall about \$40,000 short of the earnings the jury credited to his earning power, calculated on a 3% simple interest basis. If we assume he saved half of those earnings — which manifestly would be impossible — we still fall \$10,000 short of the \$65,000 the jury allowed him, which leaves us without any basis for any award to Mrs. Sanders' estate at all.

We are not here to defend the Arizona measure of damages — we are here to say that under the Arizona law the verdicts are absurd — so manifestly the result of sympathy that to permit them to stand would amount to taking these defendants' property, not through the instrumentality of a court of justice but in defiance of law — using the procedures of our courts to take money out of one person's pocket and put it into that of another who has no right in law or justice to have it.

The accident happened at three o'clock in the morning. There were the usual gouges and marks on the pavement, all of which concededly were on the north side of the highway, which would have been the wrong side of the highway for defendants. After the collision (T.R. 216) defendants' truck went about two hundred feet generally northeasterly across the highway and ended completely off the highway facing generally northeasterly. There were tire marks from a point a few feet north of the center line apparently leading to the rear duals of defendants' trailer. The course of defendants' truck and trailer, if reflected by the tire marks, was straight, that is, it did not swerve until it came to a rest. The Hudson ended up facing generally south on the north half of the highway about half on and half off the north shoulder of the highway. (T.R. 163) The left front fender was torn off the Hudson and was found underneath defendants' truck where stopped. (T.R. 173, 174) The left front wheel of the Hudson

was crushed. (^{PLF's} ~~Def't's~~ Exhibit ⁵..... in Evid.) The front wheels of the Mack tractor of defendants were torn loose from the tractor and rode the under carriage back to the driving wheels of the tractor where they were found when the vehicle came to rest. (T.R. 177, 178, 356) The front of the tractor was uninjured except that the left front bumper was bent sharply inward. The left side of the tractor from the front bumper back to the drivers was raked clean, left fender, running board and battery case were all torn off. (^{PLF's} ~~Def't's~~ Exhibit ^{6, 26} in Evid.) Looking at the truck from the front, however, showed no evidence of impact other than the left end of the front bumper, about two feet in length, was bent almost at right angles and the end rested against the frame of the truck. A radiator guard plate about a foot above the bumper of fairly light steel showed no evidence of impact. (~~Def't's~~ Exhibit ^B..... in Evid.)

The entire left front corner of the Hudson was a shambles — crushed back into the front seat. (~~Def't's~~ Exhibit ^{5, 9}..... in Evid.)

Against this physical evidence plaintiff countered with general statements by persons who were at the accident scene that night when all was confusion or the next morning long after the wreck (T.R. 108 et seq.; 158 et seq.; 184 et seq.;) generally to the effect that these were the marks beginning north of the center line near certain gouges or marks and leading to the rear of defendants' truck. Admittedly none of the witnesses made a detailed or careful examination, admittedly the pavement was washed off by a pressure washer using either about forty pounds of pressure or seventy pounds (T.R. 187, 188, 209, 210, 211) which contained a salt solution known as "wet water."

Ripka testified that the impact broke the air line which would have the effect of setting up the brakes on the trailer automatically which would occur within a few seconds after the break. (T.R. 264)

While we do not expect this court to re-try the issue of liability, we do say that the principal facts are such that, of necessity, it had to be the Sanders' car which crossed over the center line. If

the heavy Mack truck and trailer had been turned into the Hudson at the moment of impact, as squarely as the left front corner of the Hudson was engaged it would have simply rolled on over the top of the car and rolled it up before the Mack. The entire left front corner of the Hudson was involved. If it was on its own side and in proper position on its side, for the Mack to have engaged the Hudson sufficiently to cause that type of damage the Mack would of necessity had to be cutting sharply across the center line. Had this been the case upon its left front engaging the Hudson it would as a physical result have turned across the highway and overturned. In addition, for the Mack to have been the turning vehicle and to have done the damage to the Hudson shown by the pictures, the left front corner of the Mack would have to have been involved — yet it was uninjured.

The fact there are tire marks from the scene of the accident mean little. When the Hudson caught the left front wheel of the Mack of necessity the truck was turned north and across the center line. Ripka was temporarily stunned and he did not put the trailer brakes on; (T.R. 271) this was the result of automatic action which would result in the brakes coming on as the trailer reached the accident scene.

Three hard facts, above argued, demonstrate the jury was out of hand as to liability as well as damages:

1. Had the truck been turning sufficiently to engage the Hudson across its entire front end, it would have turned across the highway and overturned;
2. Had the truck been turned sufficiently to engage the left front corner of the Hudson and by *its force forward* done the damage to the Hudson shown, it would have rolled the Hudson before it; it would have flattened it like a road roller flattens a tin can;
3. Had the truck been sufficiently turned across the highway that it was running into the Hudson to have done the damage by force forward of the truck the left front corner of the truck would have been involved. This the pictures show did not occur.

(Def't's Exhibit in Evid.) The bent bumper on the left front of the Mack, the crushed left front wheel of the Hudson, the torn loose front wheels of the truck all combine to point unerringly to the truth; all corroborate Ripka's testimony that the Hudson cut into the truck just catching it on its left front wheel.

We are not unaware of the burden we assume in asking this Court to review the action of the trial court on the question of excessive damages.

The decision of this Court in *Southern Pacific Co. vs. Guthrie*, 180 F. 2d 295, id. 186 F. 2d 928, lays upon us a burden which is heavy, although we do not interpret the use of the word "monstrous" in the second opinion as adopting that as a test for review. We firmly believe that where upon the record as made there is no evidence from which a reasonable man can conclude the damages awarded were justified, a litigant is entitled to relief. We believe the modern view in the federal appellate courts is moving in that direction.

Bucher vs. Kraus, 200 F. 2d 576 (Seventh Circuit)

"And quite apart from the error in the charge, we think the trial judge erred in refusing to set aside the verdict as excessive and grant a new trial. Ordinarily, of course, the amount of damages is for the jury, and whether a verdict should be set aside as excessive is a matter resting in the discretion of the trial judge. This, however, is not an arbitrary but a sound discretion, to be exercised in the light of the record in the case and within the limits prescribed by reason and experience; and where a verdict is so excessive that it cannot be justified by anything in the record or of which the court can take judicial notice, it is the duty of the judge to set it aside. Failure to do so is an abuse of discretion, analogous to error of law, and as such reviewable on appeal."

Virginian Ry. Co. vs. Armentrout, 166 F. 2d 400 (Fourth Circuit)

Brabham vs. State of Mississippi, 96 F. 2d. 210 (Fifth Circuit)

In *Ford Motor Co. vs. Mahone*, 205 F. 2d 267, (Fourth Circuit) the court held that the size of the verdict, which had no

support in the evidence, and the pitiful condition of the plaintiff warranted a finding that sympathy was the cause of the excessive verdict, and reversed the order of the trial judge denying a new trial on the ground of excessive damages.

See also *Trowbridge vs. Abrasive Co.*, 190 F. 2d 825 (Third Circuit)

We believe, further, that a valid distinction exists between a personal injury case where the intangible values of pain and suffering, embarrassment, and discomfort, are involved, and a wrongful death case where a jury has little speculative leeway in awarding damages, for there are involved no intangible values to be appraised by the jury and trial judge and which bring heavily into play judgment and discretion.

Either we should simply tell the jury to bring in such verdict as they think right or we should require that they relate their finding to some evidence which at least tends to support their conclusion.

We recognize the powerful and overriding impulse to help which could not but arise upon seeing three orphaned girls in the court room. Certainly it is a tragic thing. We say the rank tragedy of the occurrence blinded the trial jury to where it refused to weigh liability dispassionately and caused it to reject the court's instructions on the measure of damages entirely.

For a jury to find that Mrs. Sanders, with no history of any training or earning power other than as a baby sitter, would earn and save, after taxes, living expenses, etc. \$35,362 (at 3% simple interest) during her life expectancy of about twenty-nine years makes a mockery of the court's instructions. *The jury simply had to ignore what the court solemnly told it as to the law.* Do we not compound this open disregard for a judicial determination of a litigant's property rights if the action of the trial judge in refusing to apply his own words as to what the law is in passing upon our motion for a new trial is affirmed?

Perhaps to lawyers and judges not familiar with our measure of damages the verdicts do not appear shocking and completely

beyond the law; perhaps in Idaho or California they would be accepted as high but not shocking. Such is not Arizona law and it was Arizona law which the jury was required to accept and be guided by in its deliberations.

We respectfully represent to the Court that justice dictates that a new trial be ordered upon this issue.

CONCLUSION

1. The judgment should be vacated and the causes dismissed for failure of proof of diversity of citizenship.

2. The judgments should be vacated and the causes dismissed for the reason Wanek, as special administrator had no authority under the Arizona statutes to bring or prosecute the actions. If it be concluded a special administrator as such is a "personal representative" before he can become such lawfully he must be appointed pursuant to the Arizona law, which limits his authority to the powers granted in the order of appointment.

3. In any event, a new trial should be ordered by reason of the grossly excessive damages, the fruit of the sympathy of the jury for the three orphaned daughters of the deceased Sanders.

Respectfully submitted,

SNELL & WILMER

By Mark Wilmer

APPENDIX

ARIZONA REVISED STATUTES

ARTICLE 2. DEATH BY WRONGFUL ACT

§ 12-612. Parties plaintiff; recovery, distribution; failure to bring action

A. An action for wrongful death shall be brought by and in the name of the personal representative of the deceased person.

B. The father, or in the case of his death or desertion of his family, the mother, may maintain the action for death of a child, and the guardian for death of his ward.

C. The amount recovered in an action for wrongful death shall be distributed to the parties and in the proportions provided by law for distribution of personal estate left by persons dying intestate.

D. The term "personal representative" as used in this section shall include any person to whom letters testamentary or of administration are granted by competent authority under the laws of this or any other state. The action for wrongful death may be maintained by any such personal representative without issuance of further letters, or other requirement or authorization of law.

E. If the deceased left no estate or assets within this state other than the cause of action for wrongful death, the action may be brought by the surviving husband or wife in his or her own name and on behalf of the estate in all cases where no letters testamentary or of administration have been issued in this state, or when the personal representative of the deceased has failed for ninety days after the cause of action accrued under the provisions of this article to bring the action.

ARTICLE 3. SPECIAL ADMINISTRATORS

§ 14-441. Circumstances under which special administrator appointed.

When there is delay in granting letters testamentary or of administration from any cause, or when the letters are granted irregularly, or a sufficient bond is not filed as required, or when no application is made for letters, or when an administrator or executor dies or is suspended or removed, the court shall appoint a special administrator to collect and take charge of the estate of the decedent in whatever county or counties the estate may be found, and to exercise such other powers necessary for preservation of the estate.

§ 14-442. Appointment of special administrator; bond

A. The appointment of a special administrator may be made at any time, and without notice, and shall be made by entry upon

the minutes of the court, specifying the powers to be exercised by the special administrator. Upon the order being entered, the clerk shall issue letters of administration to such person in conformity with the order. In making the appointment the court shall give preference to the person entitled to letters testamentary or of administration. No appeal may be taken from the order of appointment.

B. Before the letters issue, the special administrator shall give bond in such sum as the court directs with sureties to be approved by the judge, conditioned upon the faithful performance of his duties, and he shall take the oath required of administrators which shall be endorsed on the letters.

§ 14-443. Duties of special administrator

A. The special administrator shall collect and preserve for the executor or administrator the personal property of decedent, take charge and management of, enter upon and preserve from damage, waste and injury, the real property, and for such purposes may commence and maintain, or defend, actions and proceedings as an administrator.

B. The special administrator may sell any perishable property the court may order sold, and exercise such other powers as are conferred upon him by his appointment, but he is not liable in an action by a creditor on a claim against decedent.

§ 14-444. Termination of power of special administrator; delivery of property; accounting

A. When letters testamentary or of administration on the estate of the decedent have been granted, the powers of the special administrator cease, and he shall forthwith deliver to the executor or administrator all property and effects of the decedent in his custody, and render an account and report of his proceedings in like manner as administrators.

B. The executor or administrator may prosecute to final judgment an action commenced by the special administrator.

No. 15033

In The
United States Court of Appeals

FOR THE NINTH CIRCUIT

1956 TERM

GILBERT RIPKA and WILSON
BROTHERS TRUCK LINES, INC.,
a corporation,

Appellants,

vs.

CHARLES CREHORE, General
Administrator of the Estates
of Herbert Noah Sanders and
Delphia F. Sanders,

Appellee.

Appeal from the
United States
District Court
for the District
of Arizona.

BRIEF OF APPELLEES

J. ADRIAN PALMQUIST
H. KARL MANGUM

LEWIS, ROCA, SCOVILLE & BEAUCHAMP
Attorneys for Appellee

FILED

JUN 15 1956

SUBJECT INDEX

	Page
ARGUMENT	
I. Jurisdiction	8
II. Special Administrator	11
III. Liability	15
IV. Verdicts	17
CONCISE STATEMENT OF THE CASE	2
CONCLUSION	28
STATEMENT OF JURISDICTION	1
SUMMARY OF ARGUMENT.....	5

CITATIONS

CASES

	Page
Arizona Binghampton Copper Co. v. Dixon, 22 Ariz. 163, 195 P. 538	18, 20, 27
Atlantic Coast Line R. Co. v. Pidd, 197 F. 2d. 153.....	21
Ballard v. Forbes, 208 Fed. 2d. 753	21
Brooks v. Sessoms, 53 Ga. 453, 186 S.E. 456	15
Chicago Rock Island & Pacific Railway v. Kifer, 216 F. 2d. 753	17
Chicago & U.W.R. Co. v. Ohle, 117 U.S. 123, 6 S.Ct. 632, 29 L.Ed. 837	10
City of Phoenix v. Mayfield, 41 Ariz. 537, 20 Pac. 2d. 296	19, 20
DeAmado v. Freidman, 11 Ariz. 56, 89 Pac. 588	20
Doggett v. Hunt, 93 F. Supp. 426	10
Dominguez v. Galindo, 122 CA 2d. 76, 264 Pac. 2d. 213	14
Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 53 S. Ct. 252	7, 8
Gibbs v. Buck, 307 U.S. 66, 59 S. Ct. 725, 83 L. Ed. 1111	10
Glendenning Motorways v. Anderson, 213 F. 2d 432	17
Henkel v. Hood, 49 N.M. 45, 156 Pac. 2d. 790.....	13
Hulett v. Brinson, 229 F. 2d. 22	17
Inspiration Consolidated Cop. Co. v. Bryan, 35 Ariz. 285, 276 P. 846	20
Inspiration Consolidated Cop. Co. v. Conwell, 21 Ariz. 480, 190 P. 88	20
Jones v. Minnesota Transfer Ry. Co., 108 Minn. 29, 121 N.W. 606	14
Keefe v. Jacobo, 47 Ariz. 162, 54 Pac. 2d. 270	19, 20
Keys v. Pennsylvania Ry. Co., 158 Ohio St. 362, 109 N.E. 2d. 503	14

CASES — (Continued)

	Page
Larson v. Chicago N.W. AR Co., 172 F. 2d. 841	23
Mansfield etc. R. Co. v. Swan, 111 U.S. 379, 28 L. Ed. 462	10
McNutt v. General Motors Accep. Corp., 298 U.S. 178, 56 S. Ct. 780, 80 L. Ed. 1135	9
Nickles v. Wood, 221 Ark. 630, 225 S.W. 2d. 433	14
Pacific Gas & Electric Co. v. Almanzo, 22 Ariz. 431, 798 P. 457	20
Phoenix Ins. Co. v. Pechner, 95 U.S. 193, 24 L. Ed. 427	10
Phoenix Ry. Co. v. Landis, 13 Ariz. 80, 108 P. 247	20
Reyburn v. Young, 219 Cal. 536, 28 P. 2d. 353	15
Siebrand v. Gossnell, (Not yet reported—9th Cir. 1956— Opinion #14468)	20
Southern Pacific Co. v. Guthrie, 180 F. 2d. 295, 186 F. 2d. 926	3, 17
Southern Pacific Co. v. Wilson, 10 Ariz. 162, 85 P. 401....	17, 20
Southern R. Co. v. Wilson, 213 F. 2d. 870	17
Stallcup v. Rathburn, 76 Ariz. 63, 258 P. 2d. 821	8, 20
Stanolind Oil & Gas Co. v. Jamison, 204 Okla. 93, 227 P. 2d. 404	15
St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 58 S. Ct. 586, 82 L. Ed. 845	11
Sun Printing & Publ. Co. v. Edwards, 194 U.S. 377, 24 S. Ct. 696, 48 L. Ed. 1027	11
Swan v. Norvell, 107 Wisc. 625, 83 N.W. 934	14
Thomson v. Gaskill, 315 U.S. 442, 62 S. Ct. 673, 86 L. Ed. 951	9
Trowbridge v. Abrasive Co., 190 F. 2d. 825	21, 22
Western Truck Lines v. Berry, 52 Ariz. 38, 78 P. 2d. 997	20
Wilson v. Pollard, 190 Ga. 74, 8 S.E. 2d. 380	15

STATUTES

	Page
U. S. STATUTES	
28 U.S.C. 1441	1, 8
28 U.S.C. 1291	1
ARIZONA REVISED STATUTES	
Sec. 31-102 (A.C. 1939)	13
Sec. 31-103 (A.C. 1939)	18, 27
Sec. 32-301 (A.C. 1939)	9
Sec. 38-404 (A.C. 1939)	9
Sec. 38-406 (A.C. 1939)	12
Sec. 38-602 (A.C. 1939)	12
Vernon's Tex. Civ. Stats. Sec. 3379	12

TREATISES

2 Cyc. Fed. Prac. 3rd Ed.	10
2 Moore Fed. Pract.	10, 11

No. 15033

In The
United States Court of Appeals

FOR THE NINTH CIRCUIT

1956 TERM

GILBERT RIPKA and WILSON
BROTHERS TRUCK LINES, INC.,
a corporation,

Appellants,

vs.

CHARLES CREHORE, General
Administrator of the Estates
of Herbert Noah Sanders and
Delphia F. Sanders,

Appellee.

Appeal from the
United States
District Court
for the District
of Arizona.

STATEMENT OF JURISDICTION

This is an action for death resulting from an auto accident. It was originally instituted in the Superior Court of Coconino County, Arizona, by WANEK, then special administrator for the estates of the deceaseds, against RIPKA, driver of the truck which caused the deaths. Petition for removal, accompanied by an affidavit, was duly filed for this defendant by his counsel then and now, MR. MARK WILMER, appropriately and expressly setting forth the diversity of the parties, and it was accordingly removed under 28 U.S.C. § 1441.¹

¹The removal details are not shown in the printed Transcript, which begins with the amended complaint; but they are contained in the record on appeal, as supplemented by pleadings added pursuant to appropriate stipulation.

After removal, plaintiff filed an amended complaint adding as a defendant RIPKA'S employer (T.R. 3). Before judgment, CREHORE, a general administrator, was substituted for WANEK as plaintiff (T.R. 34).

The jurisdiction of the Court of Appeals rests upon 28 U.S.C. § 1291.

CONCISE STATEMENT OF THE CASE

A. The Case.

The accident, which is the subject of this action, took place at approximately 3:00 A.M., on July 10, 1954 on U. S. Highway 66, the main arterial east-west highway in northern Arizona at a point some seven and one-half miles west of Flagstaff, Arizona (T.R. 110-111). At that particular point U. S. Highway 66, two lanes in width, begins a sweeping curve to the right (T.R. 239). West of this point the road is almost perfectly straight for a considerable distance (T.R. 239). Immediately east of this point the road enters rolling country which extends to and beyond Flagstaff, Arizona, and the road is winding and hilly (T.R. 110). Plaintiff's intestates were proceeding westerly from Flagstaff, Arizona, in the north lane of travel and, having negotiated the hilly section of the highway, were approaching the end of the last curve before the straight part of the road. The defendants' vehicle was proceeding easterly in the south lane of travel about to enter the first curve (T.R. 341-345). The defendants' vehicle, a large Mack Truck with refrigerated semi-trailer weighing approximately 58,000 pounds never made the curve but proceeded eastbound diagonally across the westbound lane of travel in a straight line to where it came to rest off the north side of the highway (T.R. 240). Plaintiff's proof upon trial was that the truck struck and completely demolished the left front of the plaintiffs' Hudson sedan at a point approximately five feet two inches over the dividing center line in plaintiff's intestates' lane of travel (T.R. 399—Plaintiff's 9 in Evid.). HERBERT NOAH SANDERS was killed in the accident. DELPHIA F. SANDERS was dead on arrival at the Flagstaff

Hospital and their three children with them in the vehicle sustained injuries. The driver of the truck was uninjured.

B. The Dead.

HERBERT NOAH SANDERS was 46 years of age at the time of the accident (T.R. 275). He had resided at Oakland, California, and was a machinist by trade (T.R. 276). Prior to his death he had been employed at Hunter's Point Naval Shipyards as a machinist. His employment was covered by Civil Service and he earned, according to testimony, approximately \$2.33 per hour or upwards of \$400.00 per month (T.R. 277,—Deposition of Howard Pease, Exhibit 38). In October of 1953 he began taking a night school course to study engineering (T.R. 277). In the day time he worked out of the Machinists' Union Hall and was steadily employed (T.R. 277—Deposition of James Martinez, Exhibit 42). Testimony adduced in the trial by way of deposition showed that he was a steady worker in good health and with a good attendance record. His personal habits were described as thrifty and frugal, and he was devoted to his family (T.R. 293). The decedent had learned of opportunities for obtaining employment as a machinist at White Sands, New Mexico under Civil Service and had taken his family, together with their personal belongings to Las Cruces, New Mexico for the purpose of applying for a job. During the course of his examination for employment it became necessary that he obtain certain Civil Service records regarding his health, from his previous employment at Hunter's Point. On July 9, 1954, the family left New Mexico for California in order to obtain these records from the Naval Shipyard (T.R. 281). The deceased was killed on July 10, 1954, while traveling to California. At the time of his death he had an estimated life expectancy of 23.83 years.

DELPHIA F. SANDERS was the wife of Herbert Sanders, age 39 years. Testimony adduced, showed that she was in good health and shared her husband's habits with regard to frugality and thrift. She supplemented the family income by daily care of other children

(T.R. 292). Mrs. Sanders was dead on arrival at the Flagstaff Hospital. At the time of her death she had an estimated life expectancy of 28.90 years.

Herbert and Delphia Sanders left surviving them four daughters, one married and three minor daughters who lived with them, being age 7, 13 and 17 at the time of the accident.

While the decedents had applied their earnings to raising and educating their family, they had managed to accumulate a 1949 Hudson automobile, a two-wheel trailer, household goods, personal effects and at least \$2400.00 in cash before their untimely demise.

C. The Proceedings Below.

The original action was filed within two days after the accident in the state court at Flagstaff, Arizona, by WANEK as administrator of the decedents' estates. It named RIPKA, alleged to be a non-resident, as the defendant and service of process was made upon him before he could leave Flagstaff, Arizona. Thereafter, counsel for the defendant RIPKA filed a verified petition for removal of the action to the United States District Court based on diversity of citizenship, and amount in controversy, alleging WANEK, as administrator of the Estate of HERBERT NOAH SANDERS and DELPHIA F. SANDERS, deceased, was a resident of Arizona and that RIPKA was a resident of Illinois. The affidavit setting forth all of the necessary particulars of jurisdiction in the district court was neither denied nor controverted by plaintiffs and the case was removed to the jurisdiction of the United States District Court. Thereafter, plaintiffs filed an amended complaint adding the defendant WILSON BROTHERS by appropriate pleadings and later the agency between defendant RIPKA and WILSON BROTHERS was admitted.

Trial was held in the United States District Court at Prescott, Arizona. During the trial the defendants objected to the introduction of special letters of administration issued by the Superior Court of Arizona to WANEK. These objections were overruled

by the trial court, which observed that it had found authority for the bringing of an action by a special administrator and that in the event there should be a verdict the court would protect the interests of all parties by withholding entry of judgment until the appointment and qualification of a general administrator (T.R. 305). The jury, after due deliberation, rendered a verdict in favor of plaintiff and against defendants, finding for the estate of HERBERT NOAH SANDERS, \$65,000 in damages, and for the estate of DELPHIA F. SANDERS, \$18,750 in damages.

Thereafter, and before entry of judgment, plaintiff moved to substitute CREHORE as the duly qualified and acting general administrator of the estates of HERBERT NOAH SANDERS and DELPHIA F. SANDERS which was objected to by the defendants and over-ruled by the court.

Defendants contended in court and Appellants' Brief repeatedly asserts that plaintiff instituted this suit as a general administrator and proved only that he was a special administrator. The original complaint, the amended complaint and the affidavit of defendants' counsel on removal all refer to the plaintiff as administrator without designating him to be "general" or "special".

Judgment was entered in favor of CREHORE as general administrator and against the defendants in the full amount as returned by the verdicts of the jury. Motion for new trial alleging lack of capacity of the special administrator to institute the action, passion and prejudice and errors in admitting and rejecting evidence was filed and over-ruled by the trial court and the within appeal followed.

SUMMARY OF ARGUMENT

I. Jurisdiction.

This action was originally instituted in the Superior Court of the State of Arizona and was thereafter removed to the United States District Court upon the application of the defendant RIPKA, supported by the affidavit of his counsel. Counsel for appellants

now contends for the first time that the necessary diversity has not been proved.

As to RIPKA, the petition for removal establishes diversity. The removal papers were neither controverted nor denied by the plaintiffs and the record does not show that diversity did not in fact exist. The answer of counsel assertedly putting jurisdiction in issue by a general denial is contrary to Federal Rule 8(b) permitting general denial subject to Federal Rule 11, which states that counsel can use a general denial when *and only when* he can in good faith fairly deny all the averments of the opposing party's pleadings. (In this case the general denial is filed by the same counsel who made the oath alleging diversity).

As to WILSON BROTHERS TRUCK LINES, a defendant added after removal, the diversity of citizenship of the parties is expressly admitted.

II. Capacity of the Special Administrator.

The power of a special administrator to maintain the within action arises by virtue of the provisions of the Wrongful Death Statute authorizing such actions to be instituted by a personal representative and is not to be tested by his authority to administer the estate of the decedent generally. In interpreting wrongful death statutes it is generally held that a special administrator is a "personal representative" within the embrace of the statute. In any event the action has been tried on its merits and the defendants were deprived of no defense which they might otherwise have asserted. The general administrator was substituted prior to judgment and judgment was entered in favor of the substituted general administrator against the defendants.

III. Liability.

Although counsel for defendants acknowledge that the court will not retry a fact issue decided by the jury, it appears three pages of the brief are directed to an attempt to show the court that the jury was in error as to liability for whatever value this may

be in supporting counsel's other contention that the verdict of the jury was a result of passion and prejudice. We believe that liability is clearly established by the testimony and physical evidence establishing that the impact took place well over the dividing line of the highway and in plaintiff's intestates' lane of travel.

IV. Damages.

Appellants contend that the size of the verdict reflects that it is the result of lack of understanding and passion, prejudice or sympathy. We believe the general rule to be that the Appellate Court will not review the amount of the verdict returned by the jury, a rule bottomed on the Seventh Amendment of the Constitution, which provides that "no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law." *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, 53 S. Ct. 252. Over a period of years a trend, if it may be labeled such, has been developing, the effect of which is to allow the review of certain of these matters by the Appellate Court. Under this authority the Appellate Court does not review the excessiveness of the verdict, but it does review the action of the trial judge which may affect the verdict. Therefore, it may come within the province of the court to review whether or not the trial court abused its discretion in denying the motion for a new trial on the grounds of excessiveness of the verdict. It is worthy to note that the Appellants do not anywhere specifically assign an abuse of the discretion of the trial court in refusing to grant a new trial as error. It is also worthy of note that nowhere in the record does the matter of bias and prejudice affirmatively appear.

The only reference to passion and prejudice is counsel's suggestion in his brief that it arose "upon seeing three orphaned girls in the court room".² The record in this respect shows that upon motion of counsel for the defendants the rule was invoked and the daughters were excluded from the court room prior to the com-

²Appellants' Brief, page 31.

mencement of the trial. Further, one of the "orphans" was Mrs. Fern Schulman.

Finally, the amount of the verdict was not such as might be said to be "monstrous" or "grossly excessive" as stated in the federal cases,³ or "flagrantly outrageous and extravagant" as stated by the Arizona Supreme Court.⁴

In view of the suggestion that the jury was out of hand as to liability and damages⁵ and that the jury ignored the court's statement of the law,⁶ the Court is respectfully reminded of the admonition of the United States Supreme Court found in *Fairmount Glass Works v. Cub Fork Coal Co.* (supra), stating:

"Appellate courts should be slow to impute to juries a disregard of their duties and to trial courts a want of diligence or perspicacity in appraising the jury's conduct."

ARGUMENT

I. Jurisdiction.

This is a removed action sounding in diversity under 28 U.S.C. §1441. Under Federal Rule 81 (c), the plaintiff was free to amend to add additional parties, and no question of his right to do so is raised.

However, the defendants do now contend that the necessary diversity, in a suit removed at their behest, is not duly shown. We, therefore, refer to the key facts:

(1) As noted in the statement above concerning jurisdiction, this suit was removed at the petition of the defendant RIPKA, alleging diversity in all necessary particularity and supported on the critical point by Mr. Wilmer's oath.

(2) The amended complaint alleged that WANEK was a citizen of Arizona (T.R. 1); that the defendant RIPKA was a citizen of the State of Indiana (T.R. 1) and that the defendant corpora-

³*Southern Pac. Co. v. Guthrie*, 186 F. 2d. 926.

⁴*Stallcup v. Rathburn*, 76 Ariz. 63, 258 P. 2d. 821-823.

⁵Appellants' Brief, page 29.

⁶Appellants' Brief, page 31.

tion was incorporated in Missouri (T.R. 2). The defendant RIPKA, through Mr. Wilmer, did not deny the allegation as to the citizenship of the parties, but did allege that he was without knowledge sufficient to form a belief as to the matter contained in the paragraph of which this allegation was a part (T.R. 8). The defendant company, through Mr. Wilmer, admitted the allegation as to citizenship (T.R. 13, 14).

(3) The plaintiff offered in evidence certified copies of his letters of administration from an Arizona Court, letters which by law could only issue to a citizen of Arizona. A.C. 1939 §38-404⁷. The trial judge twice advised the jury that plaintiff "lives in" Flagstaff, Arizona (T.R. 49, 53).⁸

Defendants "suggest"⁹ that some more direct proof of diversity was required than was here offered. Nothing more was required because:

(a) The defendant WILSON BROTHERS, added after the removal, expressly admitted the citizenship of the parties. Plaintiff is put to an invariable burden of proof only where his "allegations of jurisdictional facts are challenged by the defendant," *Thomson v. Gaskill*, 315 U.S. 442, 446, 62 S. Ct. 673, 86 L. Ed. 951 (1942). If the proper allegations are made and *challenged by the defendant*, plaintiff must prove them, *McNutt v. General Motors Accep. Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936); but otherwise he is put to his proof if, but only if, the court itself has doubts; *ibid*. Such doubts the court below expressly did not have. The defendants are undoubtedly correct in asserting that the parties cannot establish jurisdiction by consent;

⁷This section is taken from the California law, Deering. Cal. Code Ann. Probate, § 420.

⁸Presumably he either took judicial notice of this fact, since Mr. Wanek was an attorney duly licensed under the State Bar Act., A.C. 1939 § 32-301, *et seq.*; or he took it from the removal papers.

⁹This being all they can do under Federal Rule 12 (h), since insofar as it is within their limited power to do so, the defense has been waived, though the court itself, of course, may raise the question.

but on the other hand, a plaintiff is not required to make proof which neither the defendant nor the court asks of him. "If the defendant attacks the allegation of jurisdiction, the burden is on the plaintiff to support it," 2 *Moore, Fed. Prac.* 1639; but normally, where the allegations are not challenged and there is nothing on the face of the record to cause doubt of jurisdiction, the court will not inquire *sua sponte*. *Gibbs v. Buck*, 307 U.S. 66, 71-72, 59 S. Ct. 725, 83 L. Ed. 111 (1939).

(b) If more were to be required than the pleadings, it has been furnished by the proof of administration.

(c) As to RIPKA, the petition for removal establishes the diversity. The petition is a part of the record which concludes the question of jurisdiction until some substantial issue is raised by a counter pleading or by the court itself. *Phoenix Ins. Co. v. Pechner*, 95 U.S. 183, 24 L. Ed. 427 (1877). The leading case in which Appellants themselves rely, *Mansfield etc. R. Co. v. Swan*, 111 U.S. 379, 28 L. Ed. 462 (1884), shows that an unchallenged petition is a proper source from which to determine diversity; and jurisdiction is abundantly there shown in this case. The defendant who removes has the burden of establishing diversity where plaintiff denies it. 2 *Cyc. Fed. Prac.*, 3d. Ed. 443.

In this case the jurisdictional allegations contained in defendant's petition to remove and supporting affidavit were not denied or controverted by plaintiff. Plaintiff filed no petition for remand of affidavit controverting the sworn statements of defendant RIPKA'S counsel. Plaintiff could not and has not denied diversity and neither defendant RIPKA or his counsel has to date, or can, suggest that diversity of citizenship does not in fact exist. The removal papers are sufficient. *Chicago & U.W.R. Co. v. Ohle*, 117 U.S. 123, 6 S. Ct. 632, 29 L. Ed. 837 (1886); *Doggett v. Hunt*, 93 F. Supp. 426 (S.D. Ala., 1950). Granting that want of jurisdiction is never waivable if it is made to appear that there was not in fact diversity of citizenship between the plaintiff and defendant RIPKA, nowhere in the record is there any evidence that the

averments in the affidavit of defendant's counsel, establishing diversity, are false.

(d) Finally, as to RIPKA, the answer which assertedly puts jurisdiction into issue by a general denial of information was filed by the same counsel who on oath at the time of the removal had alleged the citizenship of these very parties, and who also filed an answer for the corporate defendant admitting the citizenship and incorporation of the parties. Federal Rule 8(b), permitting allegation of want of information and belief to serve as a denial, is expressly made subject to Federal Rule 11, "which means that counsel can use a general denial when, *and only when*, he can in good faith fairly deny all the averments of the opposing party's pleadings." 2 *Moore, Fed. Prac.* 2103 (2d Ed.).¹⁰ This limitation is expressly emphasized by the rule in respect to denials of jurisdiction.

In the circumstances, the case calls for application of the rule that "if the requisite citizenship is anywhere expressly averred in the record, or facts are therein stated which in legal intendment constitute such allegation, that is sufficient." *Sun Printing & Publ. Co. v. Edwards*, 194 U.S. 377, 382, 24 S. Ct. 696, 48 L. Ed. 1027 (1904). In this case the admission in the companion answer; the proof of administration; the petition for removal; or any of them, should be enough.

It but remains to say that the substitution of CREHORE for WANEK does not change the jurisdictional situation; the jurisdiction is settled by the original parties. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 295, n. 28, and cases there cited; 58 S. Ct. 586, 82 L. Ed. 845 (1938).

II. The Special Administrator Had Power to Institute Action.

Appellants contend that a special administrator, as distinguished from a general administrator, had no authority to maintain this

¹⁰We do not mean even remotely to impute bad faith to the distinguished defense counsel. The general denial went to a long paragraph, of which the citizenship allegations were a very incidental part.

action. The argument is made in the alternative — either (a) the order of appointment granted no such power, and it is therefore lacking; or (b) a special administrator is not a “personal representative” under the statute pertaining to wrongful death actions. Neither point is well taken. Not merely was it appropriate that the action be brought by a special administrator under Arizona law, but it may even have been imperative; for the action had to be brought quickly, as it was, before the driver might leave the jurisdiction; and for such speedy action, a special administrator was particularly appropriate.¹¹

In support of the first alternative Appellants cite numerous Texas cases which presumably uphold their point of view. These Texas cases, however, are wholly distinguishable, arising under a special Texas Statute regarding the power of special administrators, which reads as follows:

“Temporary administrators shall have and exercise only such rights and powers, as are specifically expressed in the order of the court appointing them, and any acts performed by them as such administrators that are not so expressly authorized shall be void.”

Vernon's Tex. Civ. Stat. 3379.

The remaining cases cited to the court deal with unrelated matters, such as the authority of a special administrator to pay debts, or approve claims for services — matters having nothing to do with the power to institute actions for wrongful death.¹²

¹¹The appointment of a special administrator may be made at any time and without notice (§ 38-602, A.C. 1939). Notice of hearing on a petition for appointment of a general administrator shall be given by publication — if in a weekly for at least three weeks (§ 38-406, A.C. 1939, Supp. 1952).

¹²*Vaught v. Struble*, 65 Ida. 26, 139 P. 2d 456, involved the speculation by a special administrator with warehouse receipts; *Little v. Gavin*, 244 Ala. 156, 12 So. 2d. 549, involved the filing of an action by a special administrator after removal of the estate proceedings to the circuit court in equity; *Ex Parte Kelly*, 243 Ala. 184, 8 So. 2d. 855; *Arendale v. Johnson*, 206 Ala. 245, 89 So. 603, and *Mitchell v. Parker*, 227 Ala. 676, 151 So. 842, all involved the capacity of a special administrator to maintain actions for the collection and preservation of estate assets.

In support of the second alternative no cases are cited to support Appellants' premise that a special administrator is not a "personal representative" under statutes pertaining to wrongful death.

This action was instituted by the administrator in accordance with §31-102, A.C. 1939 (The Arizona Code in effect at the time of the accident), the material portions of which provide:

"Every such action shall be brought by and in the name of the personal representative of such deceased person, . . . The term 'personal representative' as used in this section shall be construed to include any person to whom letters testamentary or of administration have been granted by competent authority under the laws of this or any other state, and such action may be maintained by any such personal representative without the issuance of any further letters, or other requirement or authorization of law; . . ."

The issue is whether a special administrator is a "personal representative" as is required by the statute.

While there is no Arizona case directly in point (and none is cited by Appellants), the statute is common to many jurisdictions and such statutes have, in overwhelming degree, been interpreted as allowing actions by a special administrator.

We remind the court that the power to maintain the action flows from the wrongful death statute and not from the probate statute, and the power is therefore not to be tested by plaintiff's authority to administer the estate of the decedents. The point is well developed in *Henkel v. Hood*, 49 N.M. 45, 156 P. 2d 790, 791 (1945):

"Since the character of plaintiff as a personal representative under our statute is entirely foreign to and unconnected with his character as estate administrator, whatever authority he might have as such administrator is unimportant; and, since *his authority to bring and maintain the action flows from the wrongful death statute itself and not from the probate, or estate, laws of this or any other state*, it is incorrect to say that his power to sue in this connection should be tested by his authority to administer generally the estate of the deceased in the state issuing the letters." (Emphasis supplied)

See also *Dominguez v. Galindo*, 122 C.A. 2d 76, 264 P. 2d. 213, 216 (1953), declaring that the provisions of the probate code relating to special administrators "do not now and never have concerned themselves with the authority of the personal representative of a decedent to bring a death action" as provided in the survival of actions statute; and further noting that the survival provision "in turn, has never sought to distinguish between administrators with general powers and those having special powers only." See also *Jones v. Minnesota Transfer Ry. Co.*, 108 Minn. 29, 121 N.W. 606, 607 (1909), and cases there cited, holding the power of the personal representative to sue in a similar situation is "without reference to his powers and duties under the statute regulating the administration of the estates of decedents." The point is very bluntly made in *Swan v. Norvell*, 107 Wisc. 625, 83 N.W. 934 (1900), holding that while there may be "serious doubt" as to whether a special administrator can bring an action such as this under the probate provisions, "we can entertain no doubt that he is empowered to do so by the provisions of the survival of actions statute." The court added, "that a special administrator is the 'personal representative' of the deceased so long as he continues in office is not open to argument or doubt."

As the foregoing cases suggest, the term "personal representative" used in wrongful death statutes includes ancillary, temporary and special administrators, as well as general administrators and executors. In addition to express holdings on this subject, in *Henkel v. Hood*, *Dominguez v. Galindo*, *Jones v. Minnesota Transfer Ry. Co.*, and *Swan v. Norvell*, all cited and quoted *Supra*, see also *Keys v. Pennsylvania R. Co.*, 158 Ohio St. 362, 109 N.E. 2d. 503, 505 (1952):

"According to the weight of authority, the term 'personal representative', as used in wrongful death statutes, is generally considered broad enough to include a temporary, special or ancillary administrator or executor."

Nickles v. Wood, 221 Ark. 630, 255 S.W. 2d. 433, 436 (1953);

Brooks v. Sessoms, 53 Ga. 453, 186 S.E. 456 (1936).

The point is concisely made in *Wilson v. Pollard*, 190 Ga. 74, 8 S.E. 2d. 380 (1940):

"The word 'administrator' as used in the statute is unrestricted and unlimited. It necessarily follows that any administrator is included, and therefore that a temporary administrator is a proper party to bring suit under the code section 105-1309."¹³

In summary, it was completely appropriate for the special administrator to institute this action. Cases cited in an attempt to limit the powers of the special administrator in this regard either come from Texas, which has a special statute which does exclude the practice, but which does not exist in Arizona, or deal with matters other than suits by administrators. The cases substantially uniformly hold that a special administrator may bring such an action, not by virtue of the probate code but by the wrongful death statute. The course of action followed below was conventional and proper. In any event the case has been tried on its merits and the defendants have been deprived of no defense they might otherwise have asserted. *Stanolind Oil & Gas Co. v. Jamison*, 204 Okla. 93, 227 P. 2nd, 404, 408.

III. Liability.

We note with no small degree of surprise that Appellants have seen fit to inject the question of liability into their Brief on Appeal. Despite the fact that liability is not assigned as error — was not designated as a point to be relied upon upon appeal under Federal Rule 75(e) — and that counsel acknowledged that the court will not retry the issue of liability which the jury has resolved against the Appellants, approximately three pages of the brief are devoted to what is clearly an argument against liability.

¹³In this case a general administrator was substituted for a special administrator before judgment. No exception is taken to this aspect of the matter here; and we therefore merely note in passing that such a practice is proper. *Reyburn v. Young*, 219 Cal. 536, 28 P. 2d. 353 (1933); *Stanolind Oil & Gas Co. v. Jamison*, 204 Okl. 93, 227 P. 2d. 404 (1951).

Since counsel has raised this matter, we do not feel we may ignore it completely, suffice it to say however:

(1) The accident took place on a curve (T.R. 240 and Plaintiff's Exhibits 19 and 19A).

(2) Plaintiff's intestates were west bound in the north lane of travel, making a curve to their left and Defendants vehicle was east bound in the south lane of travel (T.R. 341-345). West of the point of the accident the highway is straight and level (T.R. 250). East of the point of the accident the highway enters rolling country and is winding and hilly (T.R. 110, 250).

(3) A straight line drawn down Defendant's lane of travel would cross the center line into Plaintiff's intestates' lane and would end where the Defendants' truck came to rest off the north side of the highway (T.R. 240).

(4) All of the debris, gouges and other physical evidence of impact were found on the north side of the center line and in the plaintiff's intestates' lane of travel (conceded by counsel—Appellants' Brief, 27).

(5) Plaintiff's intestates' vehicle was struck on the left front and the left front of Defendants' Mack truck was substantially damaged (T.R. 30), despite the fact that Appellants argue in their brief that it was uninjured (Appellants' Brief, 29).

(6) The investigating officer, an Arizona Highway Patrolman, Defendants' witness, testified under oath in the Coroner's inquest that "*the point of impact where both vehicles met was five feet two inches in the west bound lane of traffic, in the Sanders' lane*" (T.R. 399).

While we do not wish to pursue the matter of liability unnecessarily, we believe that this much of a showing is necessary in view of counsel's suggestion in his brief that the jury was out of hand as to liability and the statement that liability was in sharp dispute. We do not wish the Court to be left with the suggestion that the jury did not carefully and conscientiously carry out their duties.

IV. Verdicts.

Appellants' final contention is that the trial court erred in refusing to grant Appellants' motion for new trial, contending the verdicts are excessive and the result of passion, prejudice or sympathy on the part of the jury.

Appellee believes it is significant that nowhere in Appellants' Brief is it specifically charged that the trial court was guilty of an "abuse of discretion" in denying Appellants' motion for a new trial for claimed excessiveness of the two verdicts. Though it is assigned by the Appellants that the court erred in refusing to grant Appellants' motion for a new trial on the ground that the verdicts were motivated by passion or prejudice, Appellants' attack here is based on an "excessiveness" rather than "an abuse of discretion" rationale.

It is well settled that it is for the trial court to grant a new trial on the ground that the verdict is excessive. The court's action thereon is not subject to review here except for an *abuse of discretion* by the trial court in not setting the verdict aside, and an abuse of discretion is not specifically assigned as error. *Southern R. Co. v. Wilson*, (4 Cir. 1954) 213 F. 2d. 870; *Southern Pacific Co. v. Guthrie*, (9 Cir. 1949) 180 F. 2d. 295, *id.* 186 F. 2d. 926; *Chicago Rock Island v. Kifer*, (10 Cir. 1954) 216 F. 2d. 753; *Hulett v. Brinson*, (U.S.C.A., D.C. 1955), 229 F. 2d. 22; *Glendenning Motorways v. Anderson*, (8 Cir. 1954), 213 F. 2d. 432.

The rule limiting the scope of review of the "excessive verdict" issue is bottomed on the Seventh Amendment which provides that no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of common law. Review must be upon the legal aspects of the proofs as distinguished from a jury question of fact (in this case the amount of damages). As summarized in *Chicago Rock Island & Pacific Railway v. Kifer*, (*Supra* at page 756), the rule now pretty well settled in all the circuits is stated as follows:

"The Railroad Company urges that the verdict was excessive and that the trial court abused its discretion in not granting a new trial on that ground. A Circuit Court of Appeals may not review the action of a District Court in granting a motion for a new trial on the ground the damages awarded by the jury were excessive, because that is an error of fact. *Our province is limited to determining whether the trial court in denying the motion, abused its discretion. . .*" (Emphasis Supplied)

Assuming, however, the question of the amount of the awards by the jury to be properly before this Court for review on the issue of abuse by the trial court in denying Appellants' motion for new trial, it is first necessary to more fully consider the measure of damages in wrongful death actions in Arizona.

The single statutory provision relating to the measure of damages for wrongful death in the State of Arizona provides:

"In every such case the jury shall give such damages as they deem fair and just and the amount so recovered shall not be subject to any debts or liabilities of the deceased."

§ 31-103, A.C. 1939.

As pointed out by Appellants, the action is held to be for the benefit of the estates of the decedents and that the jury shall be given the instruction, as was done in this case, that as a measure it shall apply the present value of the probable accumulations of the deceased considering health, earning capacity, character and other factors relating to probable accumulations. At the same time the Arizona courts have without exception taken cognizance of the mandate of the foregoing statute, recognizing with particularity that the laws of Arizona have delegated the responsibility for the amount of the award to the jury. For example in *Arizona Binghampton Copper Co. v. Dixon* (1921), 22 Ariz. 163, 178, 195 P. 538, cited by Appellants, the Arizona court, approving the instruction that the measure of damages in such cases is the present value of the probable accumulations of the deceased, and that the jury award such damages as are fair and just, said:

"The statute seems to place the duty of arriving at this amount solely upon the jury with one admonition that they 'shall give such damages as are fair and just' . . . His life might have proved to be worth more or less than the verdict. We cannot say."

Similarly in *Keefe v. Jacobo*, (1936), 47 Ariz. 162, 54 P. 2nd. 270, 272:

"There is no complaint of the instructions on the measure of damages. The jury, in possession of proper rules to guide it, arrived at the conclusion that the deceased's estate by reason of his wrongful death, had suffered damages in the sum of \$5,000. Deceased was a common laborer, 35 years of age, earning from \$30 to \$40 per month and a steady worker. His expectancy was 31 years. The present value of his earning power over a period of 31 years might or might not amount to the sum of \$5,000. It was for the jury to say."

Further in *City of Phoenix v. Mayfield*, (1933), 41 Ariz. 537, 20 P. 2d. 296, 301, again in an action for wrongful death and claimed excessiveness in an award of \$10,000 for the wrongful death of a 24 year old waitress with two children, it is said:

"Just what value she (decedent) might have been to her estate is of course problematical. Her accumulations might have been small or considerable. The measure of damages in such a case cannot be definitely or at all accurately estimated. It was for the jury in view of all the facts and circumstances, to determine how much her estate suffered by reason of her untimely death. We cannot say as a matter of law, that the verdict is excessive, or that because it seems large, the jury was actuated by prejudice and passion. An examination of the decided cases in other jurisdictions show the courts are unwilling to disturb the verdict of the jury merely because they might have given under the same circumstances a much smaller verdict."

In the history of both the Territory and the State of Arizona, a total of ten appeals on this point have been taken to the Arizona appellate court. In every case it was assigned as error that the verdict was excessive, claiming passion, prejudice or sympathy on

the part of the jury. In every case the award of the jury was affirmed.¹⁴

The rule is well settled in the Federal Courts of Appeal and in this Circuit, that its power is not as broad as that of the trial court. As expressed by this court in its recent opinion of May 23, 1956, *P. W. Siebrand, et al. v. George F. Gossnell, et al.*, Opinion No. 14,468, (not yet reported) absent, a total want of evidence in all or any part of the case, or the erroneous exclusion from consideration by the trial court of appropriate matters, or a showing of bias or prejudice on the part of the jury, the circuit court may not reverse the trial court unless the verdict can be said to be grossly excessive or monstrous, following *Southern Pacific Co. v. Guthrie* (Supra). This too is the rule in Arizona.¹⁵

Appellant urges the adoption of a "reasonable man" rule as the test to be applied by the circuit court in reviewing the verdicts. The law is settled quite to the contrary. In a tort action the question of excessiveness of a verdict is a question to be determined by the trial court and cannot be considered as a ground for reversal unless it affirmatively appears that it resulted from bias, prejudice or passion in that the verdict can be said to be "monstrous" or

¹⁴(1906) *So. Pac. Co. v. Wilson*, 85 P. 401, 10 Ariz. 162; (1907) *DeAmado v. Freidman*, 89 P. 588, 11 Ariz. 56; (1910) *Phoenix Ry. Co. v. Landis*, 108 P. 247, 13 Ariz. 80; Rehearing (1911) 112 P. 844, 13 Ariz. 279, Affirmed (1913) 231 U.S. 578; (1920) *Inspiration Con. Cop. Co. v. Conwell*, 190 P. 88, 21 Ariz. 480; (1921) *Pacific G. & E. Co. v. Almanzo*, 198 P. 457, 22 Ariz. 431; (1921) *Arizona Bing-hampton Cop. Co. v. Dixon*, 195 P. 538, 22 Ariz. 163; (1929) *Inspira-tion Con. Cop. Co. v. Bryan*, 276 P. 846, 35 Ariz. 285; (1933) *City of Phoenix v. Mayfield*, 20 P. 2d. 296, 41 Ariz. 537; (1936) *Keefe v. Jacobo*, 54 P. 2d. 270, 47 Ariz. 162; (1938) *Western Truck Lines v. Berry*, 78 P. 2d. 997, 52 Ariz. 38.

¹⁵Footnote from *Siebrand, et al v. George F. Gossnell, et al*, above, page 17, printed opinion: "Arizona law is generally in accord, and differentiates between a verdict influenced by passion and prejudice and one that is merely excessive, *Stallcup v. Rathburn* (1953) 76 Ariz. 63, 258 Pac 2d. 821, 823. . . . The excessive verdict must be 'flagrantly outrageous and extravagant,' *Stallcup* (supra p. 824) before the Arizona Appellate Court will set it aside."

such as "shocks the judicial conscience". *Southern Pac. v. Guthrie* (Supra); *Siebrand v. Gossnell* (Supra); *Glendenning Motorways v. Anderson* (Supra); *Atlantic Coast Line R. Co. v. Pidd*, (5 Cir. 1952), 197 F. 2d. 153; *Ballard v. Forbes*, (1 Cir. 1954), 208 F. 2d. 883. None of such elements are present in this case.

Appellants cite in support of their "reasonable man" doctrine, *Bucher v. Kraus*, (7 Cir.) 200 F. 2d. 576 and *Virginian Ry. Co. v. Armentrout*, (4 Cir.) 166 F. 2d. 400. However Appellee finds these two cases only approve the rule this court may with propriety ascertain whether the trial court abused its discretion in failing to grant a new trial. In the same connection Appellants further cite *Brabham v. State of Mississippi* (5 Cir.) 96 F. 2d. 210. We find this 5th Circuit Case to hold that the verdict found to have been made excessive by passion and prejudice springing from indulgence in the jury room in such feelings, may not be cured by remittitur but only by a new trial. We do not find in this case any "reasonable man" rule as to the scope of the review applicable to the issue before this court. Appellants cite *Ford Motor Co. v. Mahone* (4 Cir.) 205 F. 2d. 267, wherein the jury had awarded a woman \$234,330.00 damages for personal injuries. The trial judge then required a remittitur of the amount exceeding \$135,000.00 as a condition of allowing the verdict to stand. This case holds that while the granting of a new trial on the ground that the verdict was excessive or that a juror was guilty of misconduct ordinarily rests in the trial judge's sound discretion, where the verdict was found by the *trial judge* to be unreasonable and grossly excessive, then he was guilty of an abuse of discretion in not granting a new trial, especially when such finding by the trial judge is coupled with a finding of partisanship of one of the jurors. We submit this case too is strictly in line with the rule in this Circuit as to the test for review when excessiveness of the verdict is assigned as error.

The remaining authority cited by Appellants in support of Appellants' "reasonable man" doctrine is *Trowbridge v. Abrasive*

Co. (3 Cir.) 190 F. 2d. 825, an action for personal injuries wherein a 44 year old plaintiff was awarded a verdict of \$126,182.24 for permanent and total disability. Appellant there contended that the amount of the verdict was so "shockingly" excessive as to warrant granting of a new trial. On this point the court said (P.830):

"We need not decide, however, whether the verdict is excessive, for this court will not substitute its judgment for that of the jury or the trial court. The question of excessiveness of a verdict is primarily one for the trial court; where, however, the verdict is grossly excessive, the denial by the trial court of a motion for a new trial constitutes such an abuse of discretion that this court will remand the cause for a new trial. A careful study of the evidence of damages in the record has failed to convince us that the verdict was so grossly excessive as to justify reversal on this ground."

Appellee believes it is appropriate to point out that the Trowbridge case is not authority for any rule different than that repeatedly and currently approved in this Circuit on the question of excessiveness of the verdict. It is a question to be decided by the trial court and cannot be ground for reversal unless it affirmatively appears it resulted from bias, prejudice or passion in that the verdict can be said to be "monstrous" or such as "shocks the judicial conscience".

This court took cognizance in *Southern Pacific v. Guthrie* (Supra), that there is an impressive list of cases, including the Supreme Court, holding the Appellate Court will not review a judgment for excessiveness of damages even in cases where the amount of the damages is capable of much more precise ascertainment than in a personal injury case. Granted the scope of the review has been expanded, it is settled in this circuit at least. This court has not, however, at any time suggested, as do Appellants, that the adequacy or excessiveness of an award of a jury in tort actions is to be tested in the light of whether "reasonable men" would otherwise conclude. This would indeed, we believe, be contrary to all of the decisions in this circuit and probably elsewhere.

The record contains no proof of any appeals to passion or prejudice in this case. Appellants, however, in argument suggest passion was engendered by the "three orphaned girls in the court room", referring to the daughters of the decedents. We are sure this court is not unmindful that some proof of appeal to passion or prejudice has been held essential by some authorities before it may be found other than from the mere size of the verdict. *Larson v. Chicago N.W.A.R. Co.* (7 Cir.) 172 F. 2d. 841, 845.

Appellants' reference to the presence of the daughters in the court room is misleading. The youngest daughter, Linda Sanders was never in the court room and for that matter never in the court house. The three older daughters of the decedents, Norma Sanders, Wanda Sanders and Mrs. Fern Schulman, were sworn as witnesses at the outset of the trial, together with other witnesses then present and were thereupon excluded by the court from the court room (T.R. 17). Norma Sanders at the time of the trial was a grown woman approaching her twentieth birthday (T.R. 275). Wanda Sanders was then seventeen years of age (T.R. 298). Mrs. Fern Schulman, who was not called as a witness, is obviously an adult, married woman. Appellants neither suggest or contend that there is any other basis in the record tending to show an appeal to passion and prejudice.

In this case, the decedent HERBERT NOAH SANDERS, a machinist and as an employee of Hunter's Point Naval Shipyards until a reduction in force in October of 1953,¹⁶ was a steady and studious worker,¹⁷ did not drink,^{16 18 19 20} was cooperative with with other personnel,¹⁶ his character was excellent, his health was good and his attendance record at work was very good.¹⁷ Sanders had advanced to the third step in the pay scale and at this work was paid \$2.33 per hour.¹⁶ After the reduction of the force in employees at Hunter's Point Naval Shipyards, Sanders worked

¹⁶Deposition Howard Pease, Plaintiff's Exhibit 38, p. 6;

¹⁷Deposition Howard Pease, Plaintiff's Exhibit 38, p. 7;

out of the Union Hall and worked every working day (T.R. 293.)¹⁸ Having accumulated time in the Federal Civil Service, shortly before his untimely death, he heard of an opening at White Sands, New Mexico, with an opportunity to return to Civil Service. He considered it desirable to get back into Civil Service in order to secure retirement and other benefits (T.R. 278). That Sanders was not only ambitious for the betterment of his earning potential, but probably would have achieved greater potentials, is attested to by the fact of his attendance at night school after leaving the work at Hunter's Point, taking courses in engineering (T.R. 277). Sanders was a very active and vigorous man.²¹ His life was closely identified with his family and family projects^{17 22 23 24 25} He was known to enjoy good health, not only at his work but in and about his home and neighborhood (T.R. 239)^{18 24 25} Sanders was obviously a man with ambition, having started at road construction work in Missouri, then coming west, working in a factory in Sacramento, California, then as machinist, first in the Moore Shipyards, then at Bethlehem, and then at Columbia Steel as a millwright for three years (T.R. 276). The only conflict in the testimony raising even a suspicion as to the good health of the decedent was from the testimony of Appellants' witness who examined Sanders for employment at White Sands. This witness stated that he had some physical findings "suggestive" of tuberculosis, but that it was not his duty to make a diagnosis (T.R. 321). It was a matter of common knowledge within the family that HERBERT NOAH SANDERS had pneumonia when he was quite young, that it left scar tissue and that Sanders had repeatedly had the experience of doctors raising the question as to

¹⁸Deposition James Martinez, Plaintiff's Exhibit 42, p. 10;

¹⁹Deposition James Martinez, Plaintiff's Exhibit 42, p. 6.

²⁰Deposition Eleanor Onstadt, Plaintiff's Exhibit 41, p. 8.

²¹Deposition James Martinez, Plaintiff's Exhibit 42, p. 18.

²²Deposition James Martinez, Plaintiff's Exhibit 42, pgs. 7, 8, 19.

²³Deposition Eleanor Onstadt, Plaintiff's Exhibit 41, p. 11.

²⁴Deposition Marilyn Tulley, plaintiff's Exhibit 39, pgs. 10, 11, 12, 16.

²⁵Deposition Marilyn Tulley, plaintiff's Exhibit 39, p. 15.

the nature of the scar tissue resulting from the pneumonia (T.R. 280). This witness after first denying under oath, later admitted upon cross examination that as a part of the record of his examination he was told by Sanders that he had had an old pneumonia (T.R. 324). Insofar as any question of the health of the decedent was concerned, the conflict was for the jury and it appears rather conclusively that the jury found more credibility in the testimony of Appellee's witnesses on this score.

The life expectancy of the decedent HERBERT NOAH SANDERS was solely the province of the jury to determine. The jury may well have taken into account increasing prosperity and the ever increasing life span and period of productivity. Quite properly the trial court instructed upon the subject of life expectancy and without objection by Appellants, as follows:

"According to the American Experience Table of Mortality, as it has been read into evidence, the expectancy of life of one aged forty-six years, is twenty-three and eighty-one one-hundredths years. And the expectancy of one aged thirty-nine years, is twenty-eight and ninety-one one-hundredths years. This table is to be considered by you, in arriving at the amount of damages, if you find that the plaintiffs are entitled to recover in the action. However, the restricted significance of this evidence should be noted. Life expectancy shown by the mortality tables is merely an estimate of the probable, average remaining length of life of all persons in our country of a given age, and that estimate is based on not a complete, but only a limited record of experience. Therefore, the inference that may be drawn from the tables, applies only to one who has the average health and exposure to danger of people of that age. Thus, in connection with this evidence, you should consider all other evidence bearing on the same issue, such as that pertaining to the occupation, health, habits and activity of the person whose life expectancy is in question."

Appellants would substitute their own firm calculation of the expectancy of life of the deceased, and their own conclusion as to the future earning power and accumulations of HERBERT NOAH SANDERS, for that of the jury or would seek that this Court make

such substitution. The jury had the right to take into account not only the amount of money acquired by both these people until the time of their demise, but also to consider the amount they were capable of earning and saving. This was peculiarly their province. Appellants overlook that since 1940, and in fact even since the trial of the case a year ago, earning power has generally increased as well as the prosperity of the country and the life expectancy of its people. This is an era when not only professional people, but workingmen own their own homes, invest in the stock market and accumulate substantial property interests. Who can say that the twelve businessmen composing the jury were guilty of passion and prejudice if they took these factors into account in arriving at their verdict. The judicial conscience cannot be "shocked" or find "monstrosity" in an award of \$63,000 under these circumstances.

No question was raised at to the good health, good habits, frugality and industry of the decedent DELPHIA SANDERS. She was thrifty and thought twice about spending money.²⁶ Throughout her 39 years Mrs. Sanders had displayed her capabilities of performing well and thoroughly the work to which she had thus far addressed her life, as wife, housekeeper and mother of four daughters (T.R. 294). Her family was growing up, and with her habits of industry and good health, it was for the jury to estimate her probable future earning potential. Even while rearing four daughters she found time to give care to children of other people to supplement the family funds (T.R. 292).^{27 28} A woman capable of caring for this family through its growing years certainly had the ability to earn as much as an elevator operator, bus driver or clerk, jobs which many women occupy today. It was for the jury to estimate what her potential and probabilities were in that or other types of gainful employment. It must not be overlooked that the residences of the decedents have been in those jurisdictions

²⁶Deposition James Martinez, Plaintiff's Exhibit 42, p. 12.

²⁷Deposition Mildred M. Saunders, Plaintiff's Exhibit 43, p. 9.

²⁸Deposition Marilyn Tulley, Plaintiff's Exhibit 39, p. 7.

having a community property status for accumulations of husbands and wives. It was logical, reasonable and fair for the jury to have presumed, as a matter of common knowledge, that in all probability the expectancy of DELPHIA SANDERS would exceed that of her husband, and that in her declining years, after the death of her husband, her income would have been less, resulting in utilization of some of her capital and that the loss to her estate ultimately would have been far less than that of her husband. The award for her loss in the amount of \$18,750 under these facts and circumstances cannot be said to be either "monstrous" or "shocking to the judicial conscience."

Appellants admit the jury was in possession of all proper rules to guide it. The Arizona Statute (§ 31-103, A.C. 1939, *supra*) on the measure of damages in wrongful death actions, as said by the Arizona Supreme Court in *Arizona Binghampton Copper Co. v. Dixon*, (*Supra*), places the duty of arriving at the amount solely upon the jury with one admonition, that they "shall give such damages as are fair and just." The Honorable James A. Walsh, trial judge heard fully Appellants' motion for new trial on the grounds that the verdicts were excessive and based on passion and prejudice, and in the light of all of the evidence and applicable law found the motion without merit. The record is devoid of any appeals to passion or prejudice, and the record does not support the charge that the amount of either verdict is so monstrous or grossly excessive that it should be held that the trial judge was guilty of abuse of discretion.

One other matter is raised by Appellants at the outset but it appears to have been abandoned by them in their argument and conclusion as to the points relied upon in their appeal. Appellants state that an error exists by reason of the failure of the plaintiff below to offer any actuarial evidence as to the measure of damages. No case or authority whatsoever is cited by Appellants in support of Appellants' statement. Appellants requested no instruction in

this connection and made no objection to any instruction as to the measure of damages. As we have pointed out, the jury was fully advised as to the factors to be taken into account in determining the issue of future probable accumulations. Had Appellee offered expert testimony as to a calculation of the measure of damages, surely such testimony would have been inadmissible as constituting an invasion of the province of the jury.

CONCLUSION

1. Appellants now contend that the necessary diversity has not been duly shown. There is no showing in the record that the necessary diversity did not in fact exist, only the allegation that it was not proved. With respect to the alleged failure of proof as to the defendant RIPKA, counsel's affidavit on removal alleges diversity in all necessary particulars, and the affidavit was neither denied nor controverted by the plaintiff. We believe no further proof is required nor can it be said that the allegations of diversity have been placed in issue by a general denial of citizenship filed by counsel after removing the cause. The answer of the defendant, WILSON BROTHERS expressly admits the citizenship of the parties.

2. The authority of a special administrator to maintain this action flows from the express provisions of the wrongful death statute giving the cause of action to the "personal representative" of the deceased, which term necessarily includes a special administrator and his authority to maintain the action is not to be tested by his authority to generally administer the estates of the decedents.

3. The trial court's action in refusing to grant Appellants' motion for a new trial for claimed excessiveness of the two verdicts is not subject to review in the Circuit Court, except for a finding of an abuse of discretion by the trial court in not setting the verdict aside, and an abuse of discretion is not here assigned or made out by the record. If properly before the court, the question of

excessiveness of the verdicts is to be determined by the trial court and cannot be considered as a ground for reversal unless it affirmatively appears that it resulted from bias, prejudice or passion in that the verdicts can be said to be "monstrous" or such as "shocks the judicial conscience." None of such elements are present in this case.

We submit that the specifications of error are without merit and that the judgement of the trial court should be affirmed.

Respectfully submitted,

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No. 15033

IN THE

United States Court of Appeals

For the Ninth Circuit

1956 TERM

GILBERT RIPKA and WILSON
BROTHERS TRUCK LINES, INC.

a corporation,

Appellants,

vs.

*Appeal from the United
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the District of Arizona*

CHARLES CREHORE, General
Administrator of the Estate of
Herbert Noah Sanders and Del-
phia F. Sanders,

Appellee,

APPELLANTS' REPLY BRIEF

SNELL & WILMER

Attorneys for Appellants

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JUN 25 1956

INDEX

	Page
I—REPLY TO ARGUMENT RE JURISDICTION	1
II—POWER OF SPECIAL ADMINISTRATOR TO INSTITUTE ACTION	3
III—LIABILITY	9
IV—VERDICTS	11

CITATIONS

CASES

	Page
Alexander vs. Westgate etc. Co., 111 F. 2d 769	2
Brooks vs. Sessoms, 53 Ga. 453, 186 S.E. 456	7
Dominguez vs. Galindo, 122 C.A. 2d 76, 264 P. 2d 213	7
Electro Therapy Products Corp. vs. Strong, 84 F. 2d 766	2
Henkel vs. Hood, 49 N.M. 45, 156 P. 2d 790	7
Jones vs. Brush, 143 F. 2d 733	2
Jones vs. Minnesota Transfer Ry. Co., 108 Minn. 29, 121 N.W. 606	7
Keys vs. Pennsylvania Ry Co., 158 Ohio St. 362, 109 N.E. 2d 503	7
Nickles vs. Wood, 221 Ark. 630, 225 S.W. 2d 433	7
Royalty Service Corporation vs. City of Los Angeles, 98 F. 2d 551	2
Stanolind Oil and Gas Co. vs. Jamison, 204 Okla. 93, 227 P. 2d 404	7
Swan vs. Norvell, 107 Wis. 625, 83 N.W. 934.....	7
Van Buskirk vs. Wilkinson, 216 F. 2d 737	2
Vargas vs. Greer, 60 Ariz. 110, 131 P. 2d 818	4
Western Truck Lines vs. Berry, 78 P. 2d 997	12
Wilson vs. Pollard, 190 Ga. 74, 8 S.E. 2d 380.....	7

ARIZONA REVISED STATUTES

§ 12-612	5
§ 14-442	5

TREATISES

2 Bancrofts Probate Practice	4
------------------------------------	---

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*Appeal from the United
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APPELLANTS' REPLY BRIEF

I—REPLY TO ARGUMENT RE JURISDICTION

Appellee states "where the allegations (re jurisdiction) are not challenged and there is nothing *on the face of the record* to cause doubt of jurisdiction, the court will not inquire sua sponte." (Appellee's Brief, p. 10) (Emphasis supplied)

As we indicated in Appellant's Opening Brief, but for the formal and startling admission of record by appellee's counsel

(in the presence of Arizona counsel for appellee) to the effect that counsel did not even know who his client was (T.R. 72) the question as to jurisdiction would never have occurred to appellants and we would have assumed jurisdiction in fact existed and had been proved of record.

Appellee relies upon the Petition for Removal containing the statement to the effect that the plaintiff Wanek was a citizen of Arizona as sustaining jurisdiction. We would freely admit that were this cause one pending in a court of general jurisdiction the matter would not be open to question. Clearly we would be estopped to suggest the matter to the court. Such is not the case.

This court has so consistently enunciated the rule with respect to the showing required to sustain jurisdiction that no more than a reference to the leading cases should be required:

"An appellate federal court must, of its own motion *and even against the consent or protest of the parties*, satisfy itself not only of its own jurisdiction but also of that of the lower court in a cause under review." (Emphasis supplied)

Royalty Service Corporation vs. City of Los Angeles, 98 F. 2d 551

See also:

Electro Therapy Products Corp. vs. Strong, 84 F. 2d 766

Alexander vs. Westgate etc. Co., 111 F. 2d 769

Jones vs. Brush, 143 F. 2d 733

Van Buskirk vs. Wilkinson, 216 F. 2d 737

We, therefore, upon reading the transcript of the trial in the District Court, being forcibly impressed by the statement of counsel for appellee above referred to, became curious as to just what the record showed as to his identity. This curiosity was

whetted by recollection of the fact that this shadowy client did not put in any appearance at the trial. We concede plaintiff, Wanek's, original counsel told counsel for Ripka that Wanek resided in Flagstaff when the suit was instituted. If that be sufficient to support federal jurisdiction we are content.

The statement in footnote 8, page 9, that Wanek was an attorney is without support in the record. Apparently the short answer to this portion of the legal problem here presented, if it be a problem, is that the matter was never considered in the trial court for the simple reason it did not come to our mind until a reading of the transcript raised a question as to what the record in fact was.

We concede that if the failure of the learned trial judge to question jurisdiction when counsel disclaimed, in effect, any known client, and no client appeared, was proper and, if, on this record this court is satisfied jurisdiction in fact existed, there is no legal problem posed.

II—POWER OF SPECIAL ADMINISTRATOR TO INSTITUTE ACTION

We concede that a number of state courts have held that a special administrator may maintain an action for wrongful death. We respectfully submit that under the Arizona statute this result cannot be reached. We further submit that logical, legal reasoning forbids such a result.

We further assert that even if it be concluded that a special administrator may bring such an action such a special administrator must be a *lawfully* appointed special administrator—an administrator in fact pursuant to a lawful order of appointment by a court acting within its jurisdiction.

It is held almost without exception that a probate court is not a court of general jurisdiction in the true sense of the word

—it is a court with statutory powers as distinguished from a court of general jurisdiction employing general and inherent powers.

Bancrofts Probate Practice, 2nd Edition, Vol. 1, page 50 thus states the rule:

“Since probate proceedings are everywhere recognized as being statutory in their nature, the effect of a specific enumeration of powers of a court exercising probate jurisdiction is to limit such powers by implication to those expressly conferred.”

In *Vargas vs. Greer*, 60 Ariz. 110, 131 P. 2d 818, the Supreme Court of Arizona recognized this rule. It quoted with approval from a California and a Montana case as follows:

“... It is said in *Texas Co. v. Bank of America, etc., Ass’n*, 5 Cal. 2d 35, 53 P. 2d 127, reading page 130: “Probate proceedings being purely statutory, and therefore special in their nature, the superior court, although a court of general jurisdiction, is circumscribed in this class of proceedings by the provisions of the statute conferring such jurisdiction, and may not competently proceed in a manner essentially different from that provided. *Smith v. Westerfield*, 88 Cal. 374, 379, 26 P. 206.”

“Again at page 131 of 53 P. 2d (quoting from *State ex rel. Shields v. Second Judicial District Court*, 24 Mont. 1, 60 P. 489, 493): “* * * Its power when sitting in probate matters is derived from the statute, and it cannot go beyond the provisions of the statute * * * ”

We feel appellee has entirely missed the main point upon which we relied in our opening brief. We may concede for the purpose of this argument that a properly appointed special administrator may maintain an action for wrongful death; yet appellee must fail for the record fails to support a finding that Wanek was so properly appointed.

We believe we demonstrated in our opening brief that it is the law, as enunciated both by the Supreme Court of Arizona

and by the Supreme Court of the United States (pp. 24, 25, Appellants' Opening Brief) that where there are two statutes dealing with the same subject matter, one a general statute, the other one dealing with the same subject matter in a minute and definite manner, the two are to be read together and both given effect, if possible.

Here we have a general statute, Section 12-612 A.R.S., which in general terms authorizes a "personal representative" to bring an action for wrongful death. Immediately the question arises as to what the legislature meant in so enacting this section. The legislature defined the term as a part of the statute:

"The term 'personal representative' as used in this section shall be construed to include any person to whom letters testamentary or of administration have been granted by *competent* authority under the laws of this or any other state. * * *

(Emphasis supplied)

Manifestly, if the letters of administration which are tendered to support the capacity of the action are issued by the courts of Arizona the legislature intended that they be letters issued in conformity with the applicable law as declared in the appropriate statute.

Section 14-442 (Appendix, Opening Brief, pp. 33, 34) grants to the Arizona Probate Court the power to appoint a special administrator and specifies how this shall be done and what powers such special administrator shall enjoy.

"The appointment of a special administrator may be made at any time, and without notice, and shall be made by entry upon the minutes of the Court, *specifying the powers to be exercised by the special administrator*. Upon the order being entered, the clerk shall issue letters of administration to such person *in conformity with the order*." (Emphasis supplied)

There are sound reasons why the probate court should pass upon the necessity for the special administrator to institute a

wrongful death action, fix the bond giving consideration to any probable recovery, and to otherwise supervise the powers of its ex parte appointee. We can only conclude from the letters offered that the court did no more than appoint Wanek a special administrator without specification of any further authority whatsoever. We recognize that it may be argued that it is not necessary the letters specify the powers granted but such an argument rests upon wishful thinking rather than logic. The purpose of the letters is to certify to the authority of the representative of the court and, therefore, if such is the purpose to be served, the letters issued must measure the authority granted.

The present provisions of the Arizona code regarding special administrators and their powers has remained practically unchanged since 1901. However, it was not until the 1913 revision (Title XXIII, Sections 3372, 3373, 1913 Revised Statutes) that there was added to our wrongful death statute the present definition of "personal representative". In other words, in 1913 the Arizona Legislature defined this term as including any such appointee—i.e., general or special administrator, appointed by competent authority pursuant to the laws of this state.

Certainly the legislature intended thereby to authorize such action by a special administrator appointed in conformity with the law then on the books specifying how this should be done.

The situation is no different, if we follow appellee's argument to its logical conclusion than if the legislature in the section of the probate code, had specifically stated that the special administrator might be empowered, in addition to the other powers which the court might grant him, to bring an action for the wrongful death of the decedent, and then follow this phrase of authorization to the probate court with the limitation that the order of appointment should specify what authority the court desired the special administrator to have. Merely because the authorization to the special administrator to bring such an action (if it be conceded that such authorization is granted) is found in another part of

the code it does not follow that it is freed from the wholesome restraint that the appointing court in its discretion, shall determine what authority should in fact be conferred upon the special administrator.

None of the cases cited are in point. *Henkel vs. Hood*, 49 N.M. 45, 156 P. 2d 790 involves the right of a plaintiff *properly appointed* pursuant to the laws of Texas as Community Administrator to maintain a wrongful death action in New Mexico. There was involved no requirement that the order of appointment should specify what powers the administrator should have or that the letters issued should certify these powers.

Dominguez vs. Galindo, 122 C.A. 2d 76, 264 P. 2d 213 likewise did not involve a statute which required that the power of the court to appoint a special administrator should be exercised by the probate court through an order specifying the powers to be enjoyed, which powers should be spelled out in the special letters.

The same is true of *Jones vs. Minnesota Transfer Ry. Co.*, 108 Minn. 29, 121 N.W. 606 and *Swan vs. Norvell*, 107 Wis. 625, 83 N.W. 934. So also, the same fatal distinction destroys the effectiveness as a valid precedent of the cases *Keys vs. Pennsylvania Ry. Co.*, 158 Ohio St. 362, 109 N.E. 2d 503; *Nickles vs. Wood*, 221 Ark. 630, 225 S.W. 2d 433; *Brooks vs. Sessoms*, 53 Ga. 453, 186 S.E. 456 and *Wilson vs. Pollard*, 190 Ga. 74, 8 S.E. 2d 380. In fact, *Nickles vs. Wood* involves the right of a court to appoint a special administrator as a *defendant* and the validity of service upon such appointee.

The case of *Stanolind Oil and Gas Co. vs. Jamison*, 204 Okla. 93, 227 P. 2d 404, relied upon by appellee actually is authority for appellants' position. There the action was brought by a special administrator for wrongful death. The order of appointment did not recite any power to be exercised by the special administrator and there was no minute entry of the order. Subsequent to ver-

dict and judgment plaintiff was permitted to file an order nunc pro tunc by the probate court reciting that by inadvertence the order had not granted the authority to bring the action and specifically granting the authority to bring the action to the special administrator.

The Oklahoma Supreme Court, two Justices dissenting, held that since the mother of the deceased, the real party in interest, was in being and could have brought the action in her own name, she should be permitted to substitute the *then properly authorized* special administrator for herself. The court said:

"In the instant case the mother was the real party in interest, she being the next of kin of the deceased. 12 O.S. 1941 § 1053. She could have maintained the action in her own name. 12 O.S. 1941 § 1054. Therefore the requirement pointed out in *Dierks v. Walsh*, supra, that there must be a person in being who could maintain the action in his or her own name is complied with, and the mother could have been substituted as party plaintiff under the rule announced in that case. Instead of having herself substituted she perfected the appointment of the administrator so that he was then qualified to act as her representative. This was equivalent to the substitution of herself, and such substitution was permissible under the decisions cited above."

In his dissenting opinion, joined in by Justice Welch, Justice Gibson said:

"The method prescribed for the appointment of special administrators and for clothing them with the powers to be exercised is prescribed in 58 O.S. 1941 § 212, as follows: 'The appointment may be made without notice, and must be made by entry upon the minutes of the court specifying the powers to be exercised by the administrator. Upon such order being entered, and after the person appointed has given bond, the judge must issue letters of administration to such person, in conformity with the order in the minutes.'

"In making the appointment of the special administrator there was no specification upon the minutes, or elsewhere, of his

powers as such. Since by the terms of the statute the specification of the powers to be exercised *is made mandatory and thus a condition precedent to the grant of letters carrying such powers*, the plaintiff herein did not become clothed with authority to institute the action. In view of the clear import of the statute, *that the definition of the powers must precede the grant of letters, the county court is necessarily without jurisdiction to later supply such power through retroactive order or thereby render authoritative acts theretofore done by the administrator without authority by reason of the absence of power.* An authority clearly in point and holding in accord with these views is *P. J. Willis & Bro. v. Pinkard*, 21 Tex. Civ. App. 423, 52 S.W. 626." (Emphasis supplied)

Even accepting the test of the majority, appellee here fails to meet the test *since there was no person in being capable of maintaining the action.* The children could not do so.

The statement finally made that appellants were not prejudiced will not bear careful scrutiny or analysis. What would have been the result had the jury found in favor of appellants? Could not a general administrator have re-filed the action, disclaimed any responsibility for the actions of the special administrator and pointed to the absence of any grant of authority in the order appointing the special administrator? As a matter of logic and justice, should not a party be entitled to an adversary rightfully in court and therefore capable of binding the adversary side, whatever the outcome?

III — LIABILITY

We, of course, did not present our argument on liability in the expectation that the court was to re-try this issue. We merely desired to emphasize that the unreasonable amount allowed by the jury must, clearly, have infected their examination of the issue of liability.

Appellee bases his claim that the finding of liability was reasonable upon the grounds:

(a) The accident occurred on a curve — (of as much probative value as the fact our driver was over six feet tall — if such be the fact);

(b) One party was on the curve travelling to the left; the other in the other lane. West of the accident scene the highway is straight and level; east it enters rolling country which is winding and hilly;

(c) A straight line drawn down appellants' lane of travel would cross the highway to appellee's side and to the resting place of the truck — (The truck suffered an impact to its left front wheel of sufficient severity to tear it loose from its moorings which of necessity would turn the truck across the highway. The air brakes on the trailer were actuated through the impact thereby causing the trailer brakes to take hold as the truck continued along its deflected course of travel);

(d) The debris, etc. were on the Hudson's side of the highway. (It would be most remarkable if this were not so. As we demonstrated in our opening brief, the blow to the left front wheel of the tractor turned it and spun the Hudson around. Considering the respective weights of the vehicles the laws of physics require that this happen);

(e) The evidence of physical damage to the vehicles. (Appellee avoids answering the only conclusion which can logically be drawn from the physical facts. You just cannot explain the undamaged iron plate across the front of appellants' radiator, the sharply bent-in left front bumper and the raked-away left side of the tractor upon any basis other than that appellee's decedents cut across and into the left front of the tractor. You cannot conclude from the physical evidence other than that had the heavily loaded tractor and trailer been in fact turned into and pointed against the Hudson it would have rolled over the Hudson like a steam roller over a beer can);

(f) The conclusion of the investigating officer, by his own admission, is of no validity due to his uncertainty as to its soundness.

We submit a dispassionate study of the physical evidence warrants no conclusion other than that the Hudson crossed over the center line and that appellants are being mulcted in over \$80,000 in damages they do not owe, actually or morally.

IV — VERDICTS

Appellee quickly passes by the proposition that under Arizona law the matter of assessing damages for wrongful death is a quite different matter than awarding such damages for personal injury. Peculiarly within the judgment of a jury is and should be valuing human suffering, discomfort and the like concomitants of a personal injury.

But a wrongful death action, apart from liability, boils down to determining and calculating as a matter of mathematics from the evidence what the deceased would have earned and saved and then reducing this amount to its present value.

We did not, nor do we now, represent that this Circuit is committed to or should be committed to the "reasonable man" theory. As we read the cases, *prima facie*, the trial court's ruling on a Motion for a New Trial for excessiveness of the verdicts is correct. However, if under the evidence the award is grossly excessive, shocking, plainly not bottomed upon the evidence, the appellate court should not let it stand. This, we submit, is the record here.

As disclosed by Appellee's Brief, there are ten cases in Arizona wherein our Supreme Court has had before it the question of excessiveness of an award for wrongful death. The highest award of these ten cases was the *Inspirational Consolidated Copper Company - Bryant case*, an employer-employee relationship situation

before Workmen's Compensation, in the amount of \$18,750. The other awards above \$12,500 were all employer-employee situations before Workmen's Compensation. The highest award for wrongful death, apart from employer-employee suits was the sum of \$12,500 in *Western Truck Lines vs. Berry*, 78 P. 2d 997. Of these ten cases the award has been \$5,000 or less in five cases, \$10,000 in one case, and the \$12,500 award above referred to.

Here we have what is, in effect an award based upon the earning power of the husband of \$83,750; a finding that in his remaining years he would earn enough to support himself, his wife and minor children, pay his taxes, etc., and yet save enough to pass an amount substantially over \$100,000 on to their respective estates upon the death of husband and wife.

Either instructions as to the law mean something or they don't. We can piously protest our adherence, not to the forms of justice, but to the substance of justice, but if we give but lip service to such protestations our protestations mean nothing. There is no possible basis in the evidence upon which these verdicts can be justified.

If this does not make them monstrous and grossly defective we do not know what would achieve that result. Certainly a verdict whereby defendants are called upon to "cough up" \$83,750 which is without support or justification in the evidence is not a pretty thing.

Respectfully submitted,

SNELL & WILMER

By Mark Wilmer

No. 15035

United States
Court of Appeals
for the Ninth Circuit

INTERMOUNTAIN EQUIPMENT COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

Transcript of Record

Petition for Review and Petition for Enforcement of Order
of National Labor Relations Board

FILED

JUN -8 1956

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amendment to Answer	19
Answer	14
Answer of the N.L.R.B. to Petition to Review and Set Aside Its Order and Request for En- forcement of Said Order	282
Appearances	1
Certificate of the N.L.R.B.	271
Charge Against Employer	3
Charge Against Employer, Amended	5
Complaint	9
Decision and Order	79
Dissenting Opinion	88
Exceptions to Intermediate Report and Recom- mended Order, Findings of Fact, Conclusions of Law, and Recommendations of the Trial Examiner	65
Exhibits, General Counsel's:	
No. 1-A—Charge Against Employer	3
1-C—Charge Against Employer, Amended	5
1-F—Complaint	9

INDEX	PAGE
1-H—Answer	14
1-I—Amendment to Answer	19
3—Wage Scale and Agreement	103
Intermediate Report and Recommended Order.	23
Petition for Review of Decision and Order of the N.L.R.B.	275
Statement of Points Upon Which the N.L.R.B. Intends to Rely	285
Statement of Points Upon Which Petitioner Intends to Rely	283
Transcript of Proceedings	94
Witnesses:	
Baldwin, Frank T.	
—direct	96, 112, 223
—cross	118
—redirect	136, 144
—recross	139, 146
Buntin, Roy F.	
—direct	174
—cross	190
Dufford, Philip A.	
—direct	146, 154, 231
—cross	167, 240
—redirect	173
Stewart, Alvin M.	
—direct	209, 269
—cross	219

APPEARANCES

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Assistant General Counsel, National Labor
Relations Board,
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For Respondent, National Labor
Relations Board.

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No. : 19-CA-948.

Date Filed : 1-11-54.

Compliance Status Checked By : 3-31-54.

Important—Read Carefully

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Employer Against Whom Charge Is Brought—

Name of Employer :

Intermountain Equipment Company.

Address of Establishment :

415 Broadway Avenue, Boise, Idaho.

Number of Workers Employed :

33.

Nature of Employer's Business :

Sells Heavy Equipment.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (89a) and 1 of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Bases of the Charge—

Historically, the Company has been paying bonuses to all employees for the past several years. On or about December 24, 1953, the Company paid bonuses to all employees of Employer, except employees members of this Union in the bargaining unit of an election that was held on June 18, 1953, by the National Labor Relations Board. In negotiations, a bonus was discussed and we were told by the Employer that if any bonuses were paid to any employees, all employees would receive the same.

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge:

General Teamsters, Warehousemen & Helpers,
Local Union 483.

4. Address:

613 Idaho Street, Boise, Idaho.
Telephone No. 3-5439.

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit:

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers.

6. Address of National or International, if any:

100 Indiana Avenue, N.W., Washington 1, D.C.

7. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ F. T. BALDWIN,
Secretary-Treasurer.

Date: January 7, 1953.

Willfully False Statements on This Charge Can be Punished by Fine and Imprisonment (U. S. Code, Title 18, Section 80).

[Received in evidence as General Counsel's Exhibit No. 1-A, September 28, 1954.]

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No.: 19-CA-948, Amended.

Date Filed: 1-11-54, Amended 3-8-54.

Compliance Status Checked By:

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a

complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Employer Against Whom Charge Is Brought—

Name of Employer:

Intermountain Equipment Company.

Address of Establishment:

415 Broadway, Boise, Idaho.

Number of Workers Employed:

App. 33.

Type of Establishment (Factory, mine, wholesaler, etc.):

Heavy Equipment.

Identify principal product or service:

Heavy Equipment.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1), (3) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

During negotiations on July 22nd and 23rd, 1953, after certification following an NLRB election, the Company refused to include a Bonus clause in the Working Agreement, but stated that if a Bonus was paid to the employees not included in the Bargaining Unit, that such employees would also be paid a bonus or that if they paid any employees a bonus they would pay all a bonus in keeping with their past practice. On or about December 24, 1953, the Company paid the employees not in the bargaining unit a bonus, but did not pay those employees included in the Bargaining Unit a bonus.

During the above-mentioned negotiations, the Union sought to include in the Working Agreement a provision for Sick Leave. The Company stated they were opposed to the inclusion of a sick leave clause because employees would be inclined to take the number of days included in the agreement whether sick or not. The Company agreed that they would continue to grant sick leave even as they had in the past, however, the Company has failed to grant the employees in the Bargaining Unit sick leave while continuing to grant sick leave to the other employees, all the above actions are designed to convince the employees included in the Bargaining Unit that they would be better off without the undersigned Union as their

Bargaining Representative in violation of Section 8 (a) (1), (3) and (5) of the Labor Management Relation Act of 1947.

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge:

General Teamsters, Warehousemen & Helpers
Local Union 483.

4. Address:

208 No. 16th Street, Boise, Idaho.
Telephone No.: 3-5439.

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit:

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers.

6. Address of National or International, if any:

100 Indiana Ave., N.W., Washington 1, D. C.

7. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ F. T. BALDWIN,
Secretary-Treasurer.

Date: 3-5-54.

Willfully False Statements on This Charge Can be punished by Fine and Imprisonment (U.S. Code, Title 18, Section 80).

[Received in evidence as General Counsel's Exhibit No. 1-C, September 28, 1954.]

United States of America
Before the National Labor Relations Board
Case No. 19-CA-948

INTERMOUNTAIN EQUIPMENT COMPANY,
and
GENERAL TEAMSTERS, WAREHOUSEMEN
AND HELPERS, LOCAL UNION 483.

COMPLAINT

It having been charged by General Teamsters, Warehousemen and Helpers, Local Union 483, that Intermountain Equipment Company, herein called Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth in the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director for the Nineteenth Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

I.

Intermountain Equipment Company is, and at all times material hereto has been a corporation duly organized and existing by virtue of the laws of the State of Idaho, with its principal office and place of business in Boise, Idaho.

II.

Respondent operates branches in the cities of Spokane, Washington; and Pocatello, Idaho. In the course and operation of its business the Respondent annually purchases merchandise valued in excess of two and one-half million dollars, 95 per cent of which is shipped directly to the Respondent from states of the United States other than the State of Idaho. During the course and operation of its business Respondent sells merchandise valued in excess of \$3,200,000, 25 per cent of which merchandise is sold and shipped to states of the United States other than the states in which it is sold. Respondent is engaged in interstate commerce within the meaning of the Act.

III.

General Teamsters, Warehousemen and Helpers, Local Union 483, is and, at all times material hereto, has been a labor organization within the meaning of Section 2 (5) of the Act.

IV.

On or about June 26, 1953, the Union was certified by the Board as the collective bargaining representative of the employees in the following unit:

All warehouse employees of Intermountain Equipment Company, construction machinery, equipment and parts sales and service plant in Boise, Idaho, including warehousemen, shipping and receiving clerks, price clerks, countermen, order clerks, delivery men, inventory clerks and warehouse filing clerks, excluding all managers, assistant managers, foremen, confidential secretaries, office clerical employees, outside salesmen, professional employees, guards and supervisors as defined in the Act.

V.

On or about the 27th day of July, 1953, Respondent and the Union entered into a contract covering the employees in the above unit which contract omits mention of sick leave, or annual bonuses to employees.

VI.

During the course of bargaining which culminated in the contract as set forth above, the Union demanded that provisions for sick leave and for the continuation of bonus payments to all employees be written into the contract. Respondent refused said demand, but orally agreed that in the event any bonuses were to be paid to employees that all employees including employees in the unit above would be paid bonuses without discrimination as in the past and that sick leave would be granted all employees without discrimination as in the past.

VII.

Relying upon the oral agreement entered into with Respondent, as set forth in paragraph VI above, the negotiators for the Union withdrew their demand that bonuses and sick leave provisions be embodied in the contract and entered into a contract with Respondent as set forth in paragraph V above.

VIII.

Since July 27, 1953, and at various times since, employees in the unit as set forth in paragraph IV above, have at various times lost wages because of sickness for which sick leave was not paid.

IX.

On or about December 25, 1953, Respondent paid bonuses to substantially all of its employees who are not members of the Union nor in the unit as set forth in paragraph IV above, but did not pay bonuses to those of its employees who were members of the Union or were in the units as set forth above and failed and refused to pay to these employees in the unit the customary Christmas bonus paid annually to all employees of Respondent.

X.

Since on or about December 25, 1953, at various times, the Union, through its officers and agents requested Respondent to pay the Christmas bonus to all employees without discrimination and to pay sick leave to employees within the unit without discrimination, and Respondent has at all times failed and refused to do so.

XI.

By the acts described above in paragraphs VIII, IX and X, Respondent interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and by all of said acts, and each of them, Respondent has engaged in and is now engaging in unfair labor practices within the meaning of Section 8 (A) (1) of the Act.

XII.

By the acts described above in paragraphs VIII, IX, and X, and by each of them, Respondent did discriminate against its employees in the exercise of their rights guaranteed in Section 7 of the Act and by all of said acts, and each of them, Respondent has engaged in, and is now engaging in, unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

XIII.

By the acts described above in paragraphs VIII, IX and X, and by each of them, Respondent did refuse and fail to bargain with the Union as the representative of its employees in the appropriate unit set forth above in paragraph IV, and thereby has engaged in, and is now engaging in, unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

XIV.

The activities of Respondent, as set forth and described above in paragraphs V through XIII occurring in connection with the operations of Respondent, as described above in paragraphs I and

II, have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States, and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XV.

The aforesaid acts of Respondent constitute unfair labor practices affecting commerce within the meaning of Section 8 (a) (1), (3) and (5), and Section 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 7th day of September, 1954, issues this Complaint against Intermountain Equipment Company, the Respondent herein.

[Seal] /s/ THOMAS P. GRAHAM, JR.,
Regional Director, National Labor Relations Board,
Region 19.

Received in evidence as General Counsel's Exhibit No. 1-F, September 28, 1954.

[Title of Board and Cause.] .

RESPONDENT'S ANSWER TO COMPLAINT

Answering the complaint issued by the Regional Director for the Nineteenth Region of the National Labor Relations Board upon charges by General Teamsters, Warehousemen and Helpers, Local Union 483, that Intermountain Equipment Company, herein

called Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth in the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act, Respondent admits, denies and alleges as follows:

I.

Answering Paragraph I of the complaint, Respondent admits the allegations thereof.

II.

Answering Paragraph II of the complaint, Respondent admits for the purpose of this complaint that it is engaged in interstate commerce within the meaning of the Act; but it alleges that its business operations and plants located in cities other than Boise, Idaho, and operations relative thereto, have no application in the establishment of the jurisdictional qualifications of the Board, nor are such operations and plants related in any manner to the bargaining unit which has made the charges upon which the complaint herein has been issued.

III.

Answering Paragraph III of the complaint, Respondent admits the allegations thereof.

IV.

Answering Paragraph IV of the complaint, Respondent admits the allegations thereof.

V.

Answering Paragraph V of the complaint, Respondent admits the allegations thereof.

VI.

Answering Paragraph VI of the complaint, Respondent admits the allegations of the first sentence thereof; and referring to the second sentence of Paragraph VI of the complaint, Respondent admits that it "refused said demand," but denies all other allegations of said second sentence of Paragraph VI of said complaint, and alleges that in the normal course of collective bargaining leading up to and culminating in the contract entered into July 27, 1953, that the issues of bonus payments and sick leave were discussed, negotiated, and were not agreed to by the parties of the Agreement, and are therefore not included within said contract, it being the intention of the parties that the written contract of July 27, 1953, was to be the only contract between the parties thereto, and was not to be changed, altered, supplemented or terminated by any oral agreement or other form of agreement not meeting the same requisites and form of the written agreement itself.

VII.

Answering Paragraph VII of the complaint, Respondent denies each and every allegation thereof, and alleges, without admitting that an oral agreement was ever entered into, that the parties to the agreement of July 27, 1953, having through the normal process of collective bargaining reduced their respective proposals and counter-proposals to writing and having entered into a written contract which sets out all points agreed to, neither party can now be heard to offer oral evidence which

changes, modifies or supplements the written contract.

VIII.

Answering Paragraph VIII of the complaint, Respondent denies each and every allegation thereof because it has no specific knowledge of the same.

IX.

Answering Paragraph IX of the complaint, Respondent admits that on or about December 25, 1953, it paid bonuses to some of its employees who were not members of the union nor in the unit as set forth in Paragraph IV of the complaint, but did not pay bonuses to those of its employees who were members of the Union or were in the unit as set forth above and refused to pay these employees in the unit a Christmas bonus, but denies that a Christmas bonus is customary and is paid annually to all employees of Respondent.

X.

Answering Paragraph X of the complaint, Respondent admits that since on or about December 25, 1953, at various times, the Union, through its officers and agents requested Respondent to pay the Christmas bonus to all employees without discrimination but denies that it requested Respondent to pay sick leave to employees within the unit without discrimination.

XI.

Answering Paragraph XI of the complaint, Respondent denies each and every allegation thereof.

XII.

Answering Paragraph XII of the complaint, Respondent denies each and every allegation thereof.

XIII.

Answering Paragraph XIII of the complaint, Respondent denies each and every allegation thereof.

XIV.

Answering Paragraph XIV of the complaint, Respondent denies each and every allegation thereof.

XV.

Answering Paragraph XV of the complaint, Respondent denies each and every allegation thereof.

Wherefore, Respondent prays that the complaint herein be dismissed.

Date: September 15, 1954.

INTERMOUNTAIN EQUIP-
MENT COMPANY,

By /s/ PHILIP A. DUFFORD,
Vice President.

State of Idaho,
County of Ada—ss.

On this 15th day of September, 1954, before me, a Notary Public in and for the State of Idaho, appeared Philip A. Dufford, known to me to be Vice President of Intermountain Equipment Company, the Respondent to the complaint herein, and

acknowledges to me that he has read Respondent's Answer to Complaint, that he knows the contents thereof, and that he believes the same to be full and true, and has executed the same for and on behalf of the Respondent and by authority of its governing body, this 15th day of September, 1954.

[Seal] /s/ MAXINE D. WRIGHT,
Notary Public.

Received in evidence as General Counsel's Exhibit No. 1-H, September 28, 1954.

[Title of Board and Cause.]

AMENDMENT TO ANSWER

Comes now Respondent in the above-entitled proceeding, and as amendment to its Answer filed therein, and for further and affirmative defense, alleges:

I.

Respondent realleges each and every allegation of its Answer filed herein as fully as if the same were set at length in this Amendment, and its Answer is incorporated herein by reference and made part hereof.

II.

The denials of bonuses and sick leave to Respondent's employees who are members of the Union and were in the unit as set forth in paragraph IV of the Complaint constituted and gave rise to grievances or disputes under the terms and provisions of the

contract of July 27, 1953, between Respondent and the Union; but at no time did any employee or group of employees in the unit present a grievance or dispute under the terms of the contract, nor has the Union pursued the remedy provided thereby on behalf of employees in the unit, and until such remedy has been pursued and all remedial action under the terms of the contract has been exhausted, no complaint should have been issued.

III.

After the filing of the Charge and Amended Charge herein and prior to the issuance of the Complaint, Respondent and Union met and bargained on the issues of bonus and sick leave, and as a result of collective bargaining, sick leave was incorporated in the contract dated July 27, 1954, between Respondent and Union, and bonuses were definitely excluded therefrom by agreement of both parties, and it was the intention of the parties that the exclusion of bonuses is as much a part of the contract as the inclusion of sick leave.

IV.

By meeting and bargaining with the Union on the issues of sick leave and bonuses, Respondent has rectified any violation of the National Labor Relations Act and has voluntarily taken affirmative action which the Board might require under a remedial order, wherefore the issues on which the Com-

plaint is based have become moot and further proceedings herein are unwarranted.

V.

After the filing of the Charge and before issuance of the Complaint herein, Respondent on many occasions requested the Nineteenth Region of the Board, its officers and representatives, to take action on the Charge, and subsequently, the Amended Charge, in order that it would not be compelled to enter into bargaining for the 1954-1955 contract under an atmosphere of restraint and coercion, but at all times the Nineteenth Region of the Board, its officers and representatives, failed and refused to take action by dismissal of the charges or issuance of a complaint and they, on several occasions, threatened the Respondent by stating that the Respondent would be guilty of unfair labor practices by refusal to bargain and that the Respondent had better bargain even though no action had been taken on the Charge and Amended Charge, and by reason of these threats, and under this atmosphere of coercion and restraint, Respondent, against its better judgment and will, entered into negotiations for the 1954-1955 contract in good faith but under duress, with the Union which, in bad faith, has used these charges as a lever in an attempt to obtain advantage over Respondent in negotiations and other dealings.

Wherefore, Respondent alleges that the allegations upon which the Charges are based and the Complaint was issued are without basis in fact,

that they were brought in bad faith and used in bad faith, that the Charging Union brought these charges for the purpose of obtaining undue advantage over the Respondent and for discrediting it in the eyes of its employees and customers, that the Nineteenth Region of the National Labor Relations Board, by and through its officers and representatives, conspired with the Union, and that with the Union and independent of the Union, they have pursued this action in bad faith,

Now Therefore, Respondent prays that the complaint herein be dismissed and that appropriate relief be given Respondent against the acts of the Union and the Nineteenth Region of the Board and that proper action be taken to censure the Union and officials and representatives of the Board who have wrongly used their powers and have breached the public trust.

September 27, 1954.

[Seal]

INTERMOUNTAIN EQUIP-
MENT COMPANY,

By /s/ PHILIP A. DUFFORD,
Vice President.

State of Idaho,
County of Ada—ss.

On this 27th day of September, 1954, before me, a Notary Public, in and for the State of Idaho, appeared Philip A. Dufford, known to me to be Vice President of Intermountain Equipment Company.

the Respondent to the Complaint herein, and acknowledged to me that he has read this Amendment to Answer, that he knows the contents thereof, and that he believes the same to be full and true, and has executed the same for and on behalf of the Respondent and by authority of its governing body, this 27th day of September, 1954.

[Seal] /s/ MAXINE D. WRIGHT,
Notary Public,
Residing in Boise, Idaho.

Received in evidence as General Counsel's Exhibit No. 1-I, September 28, 1954.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

Upon a charge and amended charge filed on January 11 and March 8, 1954, respectively, the complaint in this case was duly issued on September 7, 1954, alleging that the Intermountain Equipment Company, herein called the Respondent, had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1), (3), and (5) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 51 Stat. 136, herein called the Act. Copies of the charge, complaint, and notice of hearing were duly

served upon the Respondent and the charging party, General Teamsters, Warehousemen and Helpers, Local Union 483, herein called the Union.

According to the complaint, the same conduct violated the three subsections of Section 8 enumerated above, such conduct taking place when, in the course of collective bargaining with the Union, the Respondent, although refusing to agree to contract provisions calling for a certain amount of sick leave and an annual bonus, allegedly had orally agreed that, if any bonuses were paid to employees, all employees, including those in the bargaining unit, would be paid bonuses without discrimination and that sick leave would be granted to all employees without discrimination, as in the past, but that since July 27, 1953, the employees in the unit had lost wages because of sickness for which sick leave was not granted and that, although the Respondent had on about December 25, 1953, paid bonuses to substantially all its employees who were not members of the Union nor in the bargaining unit, it had failed and refused to pay to the employees in the bargaining unit the customary Christmas bonus paid annually to all its employees. The Respondent's answer, dated September 5, 1954, conceding jurisdiction, admitted the payment of bonuses to some of its employees, excluding those in the unit, and admitted refusal to pay bonuses to employees in the unit, but justified such nonpayment on the ground that bonuses were a subject of negotiation and, after discussion, were excluded from the con-

tract resulting from such negotiations. The answer denied knowledge of loss of wages by employees in the unit as a result of sickness and denied any promise to pay sick leave as in the past. In an amendment to its answer, dated September 27, 1954, the Respondent avers that denials of bonus and sick leave constituted and gave rise to grievances or disputes under the terms of the 1953 contract between the Respondent and the Union but the remedy so provided had not been utilized and that no complaint should have issued until all remedial action under the terms of the contract had been exhausted. The amended answer also asserted that the issue involved had become moot because after the filing of the charge and before issuance of the complaint the Respondent had met with the Union and bargained on the subject of bonus and sick leave and that, as a result, sick leave had been incorporated into the 1954 contract but bonuses were excluded from the contract by agreement of both parties. The amendment to the answer further alleged that the charge was filed in bad faith and without foundation in fact and that the Nineteenth Regional Office of the National Labor Relations Board, herein called the Board, had conspired with the Union in using the charge for the purpose of obtaining undue advantage over the Respondent and for discrediting it in the eyes of its employees and customers.

Pursuant to notice a hearing was held before me, as the duly designated Trial Examiner, in Boise,

Idaho, on September 28, 29, and October 1, 1954. The General Counsel of the Board, the Respondent, and the Union was each represented by counsel. Full opportunity was afforded all parties to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues. At the opening of the hearing, counsel for the General Counsel of the Board, hereinafter called General Counsel (including counsel appearing on his behalf), moved to strike certain portions of the amendment to the answer, including the portion alleging a conspiracy on the part of the Regional Office of the Board. The motion was granted as to the latter part and denied as to the balance. At the close of the General Counsel's case-in-chief, the Respondent moved to dismiss the entire complaint. The motion was denied. At the close of the hearing, the parties argued orally and were given time in which to file briefs. The General Counsel's motion to conform the complaint to the proof in formal matters was granted.

On November 9, 1954, following the close of the hearing, the Respondent filed a motion to strike the testimony of two witnesses which was offered in rebuttal, a motion to dismiss the entire complaint, and a brief in support thereof. The first motion is denied. The testimony alluded to is not the basis of an unfair labor practice in itself in view of the fact that it went to an incident occurring more than 6 months before the filing of the charge. However, the testimony went to a state of mind on the Re-

spondent's part, from which a disposition to discriminate might be deduced. As such evidence tended to cast doubt on the Respondent's good faith previously attested by its own witnesses it is within the scope of rebuttal evidence. The Respondent's motion to dismiss the complaint is granted as to the alleged refusal to bargain and denied as to the balance because of the findings and conclusions herein made. A brief was also received from the Union and has been considered.

From my observation of the witnesses and upon the entire record in the case, I make the following:

Findings of Fact

It is conceded and I find that the Respondent is engaged in commerce within the meaning of the Act in amount well in excess of the \$50,000 direct out-of-state sales as well as in excess of the amount of interstate purchases necessary to bring it within the Board's present formula for asserting jurisdiction. It is also admitted and I find that the Union is a labor organization within the meaning of the Act.

The Respondent's amendment to its answer raises a question as to whether or not resort to the grievance procedure under the 1953 collective bargaining agreement was a condition precedent to any resort to unfair labor practice proceedings under the Act. Section 10 (a) of the Act provides that the power of the Board to prevent unfair labor practices "shall not be affected by any other means of adjust-

ment or prevention that has been or may be established by agreement, law, or otherwise * * *'' Therefore, the contention of the Respondent that the complaint should not have issued is without merit.¹

I. The Unfair Labor Practices

A. The Refusal to Bargain

1. History of bonus and sick-leave practices; history of bargaining

The Union was certified by the Board as the collective bargaining representative of a unit² of the Respondent's employees, roughly the equivalent of the tool room employees in the Respondent's Boise establishment, on June 26, 1953. On July 3, 1953, Frank Baldwin, secretary-treasurer of the Union, approached Philip Dufford, the Respondent's vice

¹N. L. R. B. v. Newark Morning Ledger Co., 120 F. 2d 262, 266 (C.A. 3); N. L. R. B. v. Walt Disney Products, 146 F. 2d 44 (C.A. 9); Dant & Russell, Ltd., 92 NLRB 307.

²The unit, concerning the propriety of which no question is raised, is "All warehouse employees of Intermountain Equipment Company, construction machinery, equipment and parts sales and service plant in Boise, Idaho, including warehousemen, shipping and receiving clerks, price clerks, counter-men, order clerks, delivery men, inventory clerks and warehouse filing clerks, excluding all managers, assistant managers, foreman, confidential secretaries, office clerical employees, outside salesmen, professional employees, guards and supervisors as defined in the Act.

president and general manager, relative to a collective bargaining contract. Thereafter, negotiating meetings were held on July 22 and two other days before July 28, 1953, when a collective bargaining agreement, reached on July 27, was signed. Negotiations were conducted by Baldwin, Roy Buntin, and Alvin Stewart (the latter two being employees) for the Union and by Dufford and Ray Fortune for the Respondent. Dufford, being inexperienced in labor relations, had asked Fortune, who was in charge of labor relations for Morrison-Knudson Construction Company, to assist him. Among the topics bargained about, the subjects of wages, union shop, bonuses, and sick leave raised the greatest controversy. At about the third session, the parties discussed the union-shop demand. Dufford at first was opposed to it, but Fortune told him that Baldwin would never sign a contract without it. Discussion then centered on the period of time within which employees would have to join the Union. The Union asked the minimum time permitted by the Act. Dufford sought to extend the compulsory joining date for 6 months after date of hire. Finally the parties compromised on a 60-day period. The subjects of bonus and sick leave were then discussed.

Although, before 1953, bonus payments had been made for a number of years extending to years before 1950, no formalized plan had ever been adopted. The Respondent considered payment of a bonus to individual employees to be a matter of discretion

on the part of management after consideration of a number of variable factors. But there is evidence from which it may be found that, in practice, an employee who had been employed for a minimum of a year might expect to receive a bonus equivalent to about 1 month's wages or salary and it was stipulated that for some years prior to 1953 the Respondent had paid bonuses to substantially all its employees, including those whose job classifications were included in the unit. I infer therefore that in practice the size and payment of bonuses were more routine and in pattern than they were in theory.

Before the certification of the Union, the Respondent had no formalized practice with respect to compensated absences because of sickness or otherwise. That is to say, it had never defined what would constitute a good excuse for absence, and it had set no definite limit on the duration of compensated absence for sickness. Except in unusual situations, the Respondent left the matter of compensation for time not worked to the department heads on an informal basis, and the evidence indicated considerable lenience in such matters, not only in cases of sickness but also time off granted for errands and even a day or so off in the hunting season.

In negotiations, the Union was asking a contract provision for the payment of a bonus equivalent to 1 month's salary and it was asking for 6 days' paid sick leave during the year's period. Dufford opposed a contract provision covering either one. He said that if a definite period of sick leave were

given, the employees would take it as of right whether or not they were sick. Stewart was inclined to agree with Dufford that there was a danger of abuse. Baldwin said that such was not always the case, mentioning one company (with whom the Union had a contract) of whose employees 35 per cent did not use the full period of sick leave allowed. Dufford asked why the Union wanted sick leave in the contract and asked if they were not satisfied with the way the Respondent had handled sick leave in the past. Stewart answered that he had never taken sick leave but understood from the other employees that it had been satisfactory. Dufford said that he was proud of the Respondent's sick-leave record, that one employee had been out for quite some time with polio and was never docked. Baldwin asked if he would change the policy, and Dufford replied that he saw nothing in the near future that would justify changing the policy.

The discussion then shifted to the bonus clause. Dufford opposed this on the ground, as he put it, that the Respondent had no set policy regarding bonus payments and that it was strictly the prerogative of management, that the Respondent had no written bonus arrangement with any employee and had never had any, that if he agreed to put a bonus provision in the contract he would be committing the Respondent to paying a bonus whether or not the Respondent showed a profit, and that the Respondent would then have to pay the employees in

the unit a bonus whether or not it paid one to the other employees. The testimony is understandably at variance as to other statements made at this meeting by Dufford and Baldwin, which in retrospect assume some degree of importance. Baldwin quoted Dufford as saying that in past history the Respondent had paid bonuses to all employees and that he did not intend to change, that if anybody was paid a bonus they would all be paid a bonus. Dufford denied having said that if anyone was paid a bonus all would be paid a bonus, but he testified that, on several occasions during negotiations, he was asked questions concerning discrimination and had replied that none was intended. Since the Respondent undoubtedly reserved the right to exclude from the bonus payment any employees who had worked too short a time or who, by virtue of serious fault, merited no bonus, I conclude that Dufford did not make a statement quite so broad as that quoted by Baldwin. At one point, Fortune commented that his company paid bonuses to monthly-paid employees but not to hourly-paid employees. Dufford said that the Respondent had never discriminated between monthly-paid and hourly-paid employees with respect to the bonus. Baldwin expressed some concern that this practice might change and that employees outside the unit would be paid bonuses while those in the unit would not. Dufford said that it was not his intent to discriminate. At about this point, as nearly as I can determine by piecing together the testimony of the several witnesses who testified concerning it,

Fortune interposed by saying to Baldwin, "You heard the man. Now the monkey is on your back." Baldwin told Fortune to be quiet or he would come over to his place and organize his employees. After a few other irrelevant remarks, Fortune, turning to Dufford, commented with respect to Baldwin's statement about organizing the employees of Morrison-Knudson that, whatever Baldwin said he would do, he would do; and then, addressing Baldwin, Fortune said that the same went for Dufford and that whatever Dufford said he would do was exactly what he would do. This was taken by Baldwin to mean that Dufford's assurance about non-discrimination could be relied on and that the Respondent would continue to handle sick leave and bonus payments without a contract provision in the same manner as in the past. Baldwin called Buntin and Stewart out of the room for a conference, and asked them if they had always received a bonus and if they should take Dufford's word about the policy remaining the same. Buntin, who had been with the Respondent for nearly 5 years, said that he had always received a bonus and that as far as he knew, Dufford's word was good. Stewart concurred. Expecting a continuance of past practices with respect to bonuses and sick leave, the union negotiators returned to the meeting room, and, without again mentioning the subject of bonuses and sick leave, began negotiating on wages.

After the parties had reached agreement on the terms of the contract on July 27, the union com-

mittee tendered the agreement to the employees in the unit with an explanation of what had been said about bonuses and sick leave. The employees approved the contract.

Shortly after the Union's certification by the Board, the Respondent had installed a time clock in the parts department for the employees in the unit.³ Following the execution of the collective bargaining agreement in July, 1953, the Respondent instructed the supervisors in the parts department that they should adhere strictly to the contract and not do anything or give anything except what was in the contract. As a result, only time shown as worked by the clock was paid for and absences because of sickness were no longer approved for compensation. No instructions regarding sick leave were given to supervisors of other departments. I infer, therefore, that the practice of giving sick leave continued except in the department covered by the union contract.

About Christmas time, 1953, the Respondent paid a bonus to substantially all its employees other than those in the unit. The latter were paid no bonus. The decision to pay no bonus to those in the unit was reached in December by Dufford in consultation with Respondent's President Swenson. The

³This was not alleged or proved as an unfair labor practice, whether because the General Counsel believed no discrimination was committed thereby or because the event may have taken place more than 6 months before the date of the filing of the charge is not certain.

reason for such decision, Dufford testified, was "because we had a contract of employment with those people by which we guaranteed and had to live by the contract, which bound us to certain terms with these people, such specific binding agreement not existing with the other people, and by the terms of which contract, we could incur considerable expense. Also due to the fact that there was a possibility that payment of a bonus could, under certain sets of circumstances become a violation of our contract or * * * that unfair labor charges could be filed against us for, conceivably could be filed for payment of a bonus."

After the bonus was paid to employees outside the unit, the Union had two meetings with the Respondent in which that subject, along with a matter of hours of work, was discussed, and on January 4, 1954, Baldwin telephoned Dufford to say that he understood "some of the boys * * * had been docked for the sick leave," and he asked Dufford if the Respondent was going to pay it. According to Baldwin, Dufford "still took the position that was the Company's prerogative and that ended the conversation." The 1953 bonus was never paid to employees in the bargaining unit. When the parties negotiated a new contract in 1954, a provision for sick leave, but not for bonus, was agreed to.

2. Arguments and conclusions

The General Counsel contends that, during negotiations for the 1953 contract, the parties made a

collateral oral contract which was not inconsistent with the terms of the written contract and that the alleged refusal to bargain was the Respondent's repudiation of the collateral agreement and the alleged discrimination was the disparate treatment of employees in the unit and outside the unit with respect to bonus and sick leave. The General Counsel does not specifically argue that the refusal to bargain consisted of a unilateral change in working conditions without prior notice to the Union and opportunity to bargain thereon, but the conclusionary allegations of the complaint classify the Respondent's withholding of the bonus to those in the unit, while granting it to those outside the unit, as violations of Section 8 (a) (1), (3), and (5). Presumably, therefore, the General Counsel is relying on two theories of refusal to bargain as well as on the theory of discrimination and interference.

The Respondent denies the existence of a collateral agreement, and in its answer alleges that the issue of bonus and sick leave has become moot because, since the filing of the charge (January 11, 1954) and amended charge (March 8, 1954) and before the issuance of the complaint (September 7, 1954), the Respondent and the Union met and bargained on the said issues and as a result incorporated sick leave in the contract dated July 27, 1954, and excluded bonuses therefrom. By such bargaining, the Respondent alleges that it has rectified any violation of the Act to the equivalence of any affirmative action the Board might require under a

remedial order in this case. It is not clear whether the bargaining which took place between the parties in the period following the filing of the charge and amended charge and before the issuance of the complaint was limited to negotiating for the 1954 contract or whether it also involved negotiations respecting the payment of a 1953 bonus and of sick leave during the terms of the 1953 contract. If it was limited to the 1954 contract, the issue obviously is not moot. From other statements made in the Respondent's answer, as well as from evidence offered, I infer that the bargaining that took place between the date of the filing of the charge and the execution of the 1954 contract was confined to that contract. That bargaining looked only to the future, therefore, and not to rectifying any possible past unfair labor practices. The subject of bonuses was mentioned in two meetings toward the end of the year 1953, but evidence is lacking as to what was said there about the 1953 bonus. It is not clear whether what was said in those two meetings was just a protest by the Union with a rejection thereof by the Respondent or whether the parties explored the subject fully from a standpoint of bargaining. In any event, if any unfair labor practices were committed by the Respondent, I conclude and find that they are not moot.

The first issue to be disposed of is that of a refusal to bargain, whether on the theory of a repudiated collateral oral agreement or on the theory of making unilateral changes in existing conditions

without consulting about them with the Union. The Respondent not only denies the existence of a collateral oral agreement but takes the position that legally there could not be one made in the negotiation for a written contract because the understandings reached by the parties orally merge in the writing as the consummation thereof. It is often stated as a rule of law that in the absence of mistake or fraud a written contract merges all prior and contemporaneous negotiations in reference to the same subject, and the whole engagement of the parties and the extent and manner of their undertaking are embraced in the writing.⁴ But rules invariably have their exceptions. And an exception to this rule is that the parol evidence rule does not apply to a purely collateral contract distinct from and independent of the written agreement although it may relate to the same general subject matter and grows out of the same transaction, if it is not inconsistent with the writing.⁵ In the case at hand the writing did not provide that there should be no sick leave or bonus so there would be no inconsistency between the writing and a collateral oral agree-

⁴*Van Ness v. Washington*, 4 Pet. (U.S.) 232; *Brawley v. United States*, 96 U. S. 168; *Hawkins v. United States*, 96 U. S. 689, *Trego v. Arave*, 20 Idaho 38, 116 P. 119; *Rosen v. Tackett*, 222 Mich. 673, 193 N. W. 192.

⁵*Booth v. Booth & B. Commercial School*, 120 Conn. 221, 180 A. 278; *Mitchell v. Lath*, 247 N.Y. 377, 248 N.Y. 526, 160 N.E. 646, 162 N.E. 511; *Roof v. Jerd*, 102 Vt. 129, 146 A. 250. See A.L.I. Restatement, Contracts, Vol. I, Sec. 229.

ment. But the formation of such a collateral oral agreement would be subject to the law of formation of contracts generally. A clear meeting of the minds would be necessary, and the undertaking would have to be of the kind that the law recognizes as obligatory. I am not satisfied that such was the case here. From something that Dufford said, Baldwin got the impression that, although the Respondent would not commit itself to the definite payment of a bonus, it would not discriminate against employees in the unit if a bonus should be paid to employees at all. If the Respondent had been willing to commit itself to such an undertaking, that undertaking could, of course, have been given expression in the written contract. The failure of the union negotiators to suggest such a clause in the contract is a factor that must be considered in determining the probabilities of the existence of a collateral agreement. The parties may, of course, have been weighing the matter not so much of including such a provision in the contract as of leaving the subjects of bonus and sick leave under the Respondent's informal discretionary handling as in the past, with the understanding that there would be no discrimination in the exercise of the Respondent's discretion. But if the parties intended a collateral contractual commitment of this sort, it would be expected that the parties would attempt to nail the matter down. In order to do so, the Union would, in all probability, upon returning from the private conference across the hall between Baldwin, Buntin, and Stewart, have announced to Dufford: "All

right. We agree not to require a provision on bonuses or sick leave in the contract in consideration of your promise that you will hereafter treat the employees in the unit in all respects as you treat those outside the unit in regard to these matters.” This would have been specific notice to Dufford that the Union intended a collateral agreement and it would have required Dufford squarely to agree or disagree. The failure of the union representatives to mention the subject again after returning to the conference room is an element that derogates from the force of the General Counsel’s contention that a collateral agreement existed. I am inclined to the opinion that the Union’s attitude was one of reliance on a gentlemen’s agreement, that is, on the good faith of the Respondent rather than on a contractual commitment. I find, therefore, that no collateral oral agreement, in the legally enforceable sense, was in fact intended or made.

The General Counsel’s first contention in support of his allegation of a refusal to bargain in violation of Section 8 (a) (5) of the Act—that a repudiation of a previously made collective bargaining agreement, in itself, is a refusal to bargain in violation of the Act—will not need to be passed on here, as I have found that no collateral oral contract was in fact made.⁶ But his second apparent contention,

⁶Although the Board has not, so far as I am aware, passed on such a contention on facts such as those involved here, it has frequently stated that it will not police the terms of collective bargaining agreements.

that the unilateral termination of the practice of giving sick leave and bonuses constituted a violation of that section of the Act, requires examination. If the discriminatory aspect of the change is, for the moment, removed from consideration, I see no basis for a contention that the unilateral change was a refusal to bargain. Suppose, for the sake of argument, that the Respondent had discontinued its sick leave and bonus practices as to all employees. This would eliminate the appearance of discrimination. Under the remaining facts of this case would such a change have constituted a refusal to bargain? I think not, because after negotiations on the subject, in which the Respondent had taken the position that bonuses were a matter of management prerogative and that the Respondent did not wish to be bound to pay bonuses whether or not profits warranted it, the Union appeared content to leave those matters under the unilateral administration of the Respondent.⁷ It was contemplated, therefore, that the Respondent would not need to propose changes in bonuses or sick leave for bargaining before acting unilaterally.⁸ Furthermore, such evidence as there is indicates that the Union was given an opportunity to negotiate on the matter after the bonus was given. Hence, I find that the Respondent did not

⁷See *The Borden Company*, 110 NLRB No. 127.

⁸In this respect, the case differs from *Armstrong Cork Co. v. N.L.R.B.*, 211 F. 2d 843, and other cases where unilateral action was held to constitute a refusal to bargain.

refuse to bargain with the Union within the meaning of Section 8 (a) (5) of the Act.

There remains the question of whether or not the act of the Respondent in excluding the employees in the bargaining unit from participation in the bonus payments and sick-leave benefits, although affording them to substantially all other employees, constituted a discrimination within the meaning of Section 8 (a) (3) of the Act. In the cases where unilateral changes have been dealt with under charges of violation of Sections 8 (a) (1), (3), and (5), the discussion has sometimes centered on the question of refusal to bargain, and the decision on the matter of discrimination seems to have ridden in on the 8 (a) (5) disposition, whichever way that went. For example, in the case of *Armstrong Cork Co. v. N.L.R.B.*, 211 F. 2d 843 (C.A. 5), the court enforced the Board's order based on findings of 8 (a) (1), (3), and (5) violations in the withholding of a general wage increase from union-represented employees while granting it to other employees (103 NLRB 133), while in the case of *N. L. R. B. v. Nash-Finch Company*, 211 F. 2d 622 (C.A. 8), the court denied enforcement of the Board's order based on findings of like violations for the discontinuance of life insurance, hospitalizations, and Christmas bonus (103 NLRB 1695). In neither of the foregoing cases did the court attempt to separate the discrimination aspect of the case from the refusal-to-bargain aspect. In fact, neither court appears to have given the question of discrimina-

tion any separate consideration at all. Yet, it appears to me that a separation of the two aspects of such cases is especially essential, both in respect to the existence of an unfair labor practice and in respect to the appropriateness of a remedy. For a refusal to bargain, the appropriate remedy is not that a respondent shall rectify a discrimination by giving benefits withheld. The injunctive and affirmative orders in a case of refusal to bargain are designed only to require the performance of the statutory duty to bargain. Where the Board's order is designed to equalize disparate treatment of employees, such remedy is appropriate to the cases in which a violation of Section 8 (a) (3) rather than 8 (a) (5) is found. In fact, in the absence of a finding of discrimination, I can think of no case where a refusal to bargain could appropriately be remedied by an order to give monetary benefits to one group of employees from which group alone they had been withheld. Where the Board gives such remedy, it is because it finds an unlawful discrimination without regard to whether or not a refusal to bargain is involved in the case.⁹ The failure of the court in the Nash-Finch case to discuss the matter of discrimination at all detracts from its force as a precedent in this case, because the

⁹Jersey Coast News Co., 105 NLRB 430; Newark News Dealers Supply, 94 NLRB No. 239; Gaynor News Co., 93 NLRB 299; Rockaway News Supply Co., 94 NLRB 1056; Winona Textile Mills, Inc., 68 NLRB 702; Sullivan Dry Dock and Repair Corp., 67 NLRB 627; Chicago Steel Foundry Company, 49 NLRB 100.

absence of discussion of discrimination suggests an oversight. Perhaps the court would have reached the same conclusion on the facts of that case even if it fully considered the question of discrimination, because it was of the opinion that a change in the language of the proposed maintenance-of-standards clause was made with a design to eliminate the fringe benefits previously enjoyed.¹⁰ On such an interpretation of the negotiations, a claim to discriminatory treatment might be ungrounded. If a bargaining representative, seeking a contract provision for the payment of a bonus or other benefit, is told by the employer with whom it is bargaining, "No, we will not give it to you—what we have otherwise said we would give the employees represented by you is the sum total of what we will give them, even though we reserve the right to give additional benefits to employees outside the collective bargaining unit," and if the bargaining representative settles on that basis, it is charged with notice

¹⁰The Union at an early stage of the negotiations in the instant case proposed a clause that employees would retain the special privileges previously enjoyed. This was apparently rejected and eliminated. The Respondent suggests that "special privileges" included sick leave and bonus, and thus apparently seeks to make the facts here more analogous to those in the Nash-Finch case. But the bonus and sick-leave clauses were separately proposed in the negotiations in addition to the special-privileges clause. Stewart testified that the special-privileges clause was intended to cover such subjects as coffee breaks. I conclude that the parties understood that sick leave and bonuses were not intended to be covered by the special-privileges clause.

of the possibility of disparate treatment—notice that the employees whom it represents may not be given such additional benefits as may be given to unrepresented employees. Any discrimination that follows would not, in my opinion, be unlawful discrimination because the right to complain of discrimination was consciously bargained away. Although the parties in the Nash-Finch case did not put their intentions into such express language, the court apparently concluded that the effect was the same as if they had. The difference of opinion between the Board and the court in that case is not as to what result would follow in a case where the intent of the parties is expressed as I have put it above in the hypothetical case but apparently stems from the interpretation of the words and acts of the parties. The Board interpreted them as showing no intent to bargain away existing conditions, while the court apparently interpreted them as showing such intent. Indeed, from the language used by the court, one receives the impression that the court considered intent to be of no consequence at all, for it recites, “Where parties to a contract have deliberately and voluntarily put their engagement in writing in such terms as import a legal obligation without uncertainty as to the object or extent of such engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing. *Ford v. Luria Steel & Trading Corp.*, 8 Cir., 192 F. 2d 880, 884 and cases cited.” By this

language, actual intent is rendered nugatory in the face of a conclusive presumption. The legal generality quoted is not precisely apposite, however. It would be, undoubtedly, if one of the parties were contending that the contract embraced an undertaking not expressed in the final writing. But that was not the case. The union in the Nash-Finch case was not suing for breach of contract, contending that additional benefits beyond those shown in the writing were contracted for. The contention there advanced by the General Counsel and accepted by the Board was that the several fringe benefits were not contracted for. So the question was not whether or not the writing expressed the full contract. It was whether the parties intended to leave the subject of fringe benefits open for future negotiations, or intended that further consideration of them should be foreclosed. The court may have been justified in attributing the latter intent to the parties on the facts of the case; an inference of such intent was not unreasonable. But resort to a conclusive presumption in the Nash-Finch case was not needed and I do not read the decision there as a complete disregard of intention. Certainly, if the parties after negotiating on a fringe benefit, decide that further study is needed before any agreement can be reached thereon and thus decide to postpone further negotiation on that subject for 60 days to permit such study, meanwhile executing a collective bargaining agreement covering everything agreed to up to that point, the execution of the contract should not foreclose further negotiations. This is

because the intent of the parties discloses otherwise, and no conclusive presumption should be drawn, contrary to the intentions of the parties, that the execution of the written contract sealed off negotiations on the deferred subject.

The Board, of necessity, recognizes the importance of the apparent intent of the parties when it distinguishes between those cases where a subject of bargaining is omitted from a written agreement on the one hand after it has been a topic of negotiation and on the other where it has not even been considered for bargaining.¹¹ In the first, the failure to press for the omitted subject in my opinion justifies an inference that the party making the demand originally is content to dispense with any contractual obligation in view of the other concessions made (the problem of interpreting Section 3 (d) of the Act wholly aside). In the second, no inference of such an intent can be drawn. The natural inference there would be that neither party even thought of the matter.

Whether or not the court in the Nash-Finch case reached a correct conclusion, I am of the opinion that the court did not distinguish between a con-

¹¹The Jacobs Manufacturing Company, 94 NLRB 214, where the Board indicates that the parties by expressed intent may foreclose bargaining during the terms of the contract by stating therein that they intend the contract to be complete and to foreclose further bargaining whether or not subjects of bargaining were raised in negotiations. See Phelps Dodge Copper Products Corporation, 96 NLRB 982.

tractual obligation to furnish something and a statutory obligation to bargain about that subject. Also in the court's opinion is an apparent intimation that collective bargaining agreements are to be tested by the rules governing contracts generally so that if the parties fail to negotiate and contract concerning a negotiable subject that subject is excluded as a negotiable subject for the term of the contract. That result might follow where strangers or parties having no existing relationship enter into a contract. Neither may compel the other to consider additional subjects for contracting. But a collective bargaining agreement is one reached by parties between whom there is an existing and continuing relationship which constantly gives rise to bargainable matters. In the interest of industrial peace, Congress has, by the Act, imposed a duty to bargain where it would not otherwise exist. It has also proscribed discrimination to encourage or discourage labor organizations. Contracting strangers are unfettered in either way. The same legal principles cannot, therefore, be applied to both types of contracting parties.

Because the Union, during negotiations, acceded to the Respondent's retention of control over the bonus and excused absence for sickness, it presumably waived those subjects as bargainable items for the duration of the 1953 contract. Does it follow, then, that the Respondent's withholding of the bonus and sick leave from employees in the bargaining unit is not only no refusal to bargain but

also no discrimination? If the parties had expressly agreed that bonus and sick leave were to be no longer given, any suggestion of unlawful discrimination thereafter arising from disparate treatment of employees in the unit from those outside in respect to those matters would be successfully dispelled. It is the Respondent's position that the same result should follow on the facts of this case. Dufford gave as reasons for withholding the bonus from the employees in the bargaining unit, first, that by the collective bargaining contract the Respondent "could incur considerable expense" and, second, that if a bonus were paid unilaterally an unfair labor practice charge "conceivably could be filed."

The first ground was apparently intended by Dufford to carry with it the idea that employees in the unit were given unequal advantage by the contract and that this was equalized by giving bonuses to employees outside the unit. In any event, the Respondent had Dufford testify to the wage rate increase resulting from the contract which, it is argued, was something the employees outside the unit did not get. If no more had been said in the bargaining conferences about bonus and sick leave than was said about fringe benefits in the Nash-Finch case, the Respondent's argument would have some force, because in the absence of expressed understandings, an understanding that the bonus might be distributed unequally in order to balance any unequal advantages acquired under the contract

might be presumed. For two reasons, however, I am not moved by the argument. In the first place, it assumes that the contract advantages were not otherwise balanced—a fact not well established. In fact, the evidence leads me to deduce that other compensating factors were present. Although the employees in the unit got an increase in their hourly rate, the Respondent terminated the 7 hours a week over 40 for which overtime pay at the rate of time and a half had been paid in the past. The result was that the take-home pay of employees in the unit, with the hourly-rate increase, was no greater than before and in some instances, at least, was slightly less. As employees not in the unit were mostly on a salary basis, I cannot assume that they suffered any comparable loss as a result of going on a 40-hour week. Rather, it would be natural to assume that their weekly rate remained the same, and, with shorter hours for the same pay, their compensation in effect would have been increased. Also, although no blanket raise in weekly pay was given to employees outside the unit at the time the 1953 collective bargaining agreement went into effect, employees outside the unit did receive merit increases in the period in which that contract was in effect. Except for the hourly rate increase, the contract does not appear to have provided benefits not previously enjoyed.

In the second place, the Respondent did not, at the bargaining conferences, evidence any intent to terminate the bonus and sick-leave practices. On the

contrary, it gave the Union reason to believe that such practices would continue. The Respondent's objection to the sick-leave clause proposed by the Union was only as to the fixed time—not to the allowance of a discretionary amount of time. Dufford's question as to whether the Union was not satisfied with the way sick leave had been handled in the past, his eulogy of the Respondent's handling of sick leave, and his answer, in response to the question as to whether the Respondent would be likely to change its practice, that he foresaw nothing in the near future that would justify changing the Respondent's policy, all were designed to create an expectation that the Respondent's practice respecting sick leave would continue, as in the past, on an informal basis. From such expressions there is no basis to infer that the parties understood sick leave was to be terminated or bargained away in exchange for other benefits. If anything, the Union was induced to give up its sick-leave demand by the Respondent's expressed intent not to change the past practice. Although such expression was not a contractual undertaking, the Union would have been justified in assuming that, if the Respondent made any change in its past practice, it would do so on some basis other than that of failure to include a provision on sick leave in the contract. This is especially true in view of the assurances which Dufford testified he gave several times in the negotiations that no discrimination was intended. The Respondent's present position, that it had a right to withhold sick leave because it was not included in

the contract after the subject was discussed, appears to be ill taken, for it amounts to an assertion that the Union should not have believed that Dufford was making his statements in good faith and so should not have relied on them in foregoing its request for a specific period of sick leave.

The Respondent's objections to the Union's contract proposal of a bonus equal to 1 month's pay was not merely to the definiteness of amount. It also objected to being under a contractual obligation to pay a bonus regardless of whether the Respondent's profits justified it. But here again, the tussle was not for a choice between bonus and no bonus. At the time the Union dropped the discussion about bonuses, no other contract provision was being considered and there was no suggestion that the Union was confronted by the Respondent with a choice between its several demands. Rather, the alternatives were contractual commitment or discretionary handling of bonuses. The Union acceded to the latter. Everything that was said, even if not put in the express words in which Baldwin quoted Dufford (that if any were paid bonuses they all would be paid bonuses), indicated that the Respondent's discretion would be based on its ability to pay and on its evaluation of individuals for determination of merit rather than on union representation or nonrepresentation. If the Respondent actually believed that the bonus was bargained away by the Union and that the execution of the contract relieved the Respondent from even considering in-

dividuals in the bargaining unit for bonus purposes, it would have had such an understanding as soon as the contract was executed. But asked when the decision was made to exclude employees in the bargaining unit from participation in the 1953 bonus, Dufford answered that it was made in December at the time when bonus payments were under consideration. He talked the matter over with President Swenson and at that time decided not to give bonuses to employees in the bargaining unit. Although at the bargaining conferences the Respondent disclaimed any intent to discriminate and excluded such intent as a reason for refusing to include a bonus provision in the contract, in December the Respondent rationalized its discrimination between employees in the bargaining unit and the other employees by the fact that employees in the unit were covered by a contract which did not include a bonus. If an employer were free to discriminate between employees on that ground, he could with impunity deprive employees represented by a union of everything provided before the union became the chosen representative which improved working conditions while at the same time continuing to provide such things for employees not so represented so long as nothing in the union contract provided therefor. So he might remove drinking fountains, washing facilities, work stools, adequate lighting, and many other improvements or conveniences from departments of employees represented by a union while continuing to provide the same thing for other employees. If those things

were not covered by the union contract, the employer would be under no obligation to continue them, but if he is going to discontinue them, he should do so on a nondiscriminatory basis to avoid the type of discrimination proscribed by the Act. So in this case, sick leave and bonuses did not have to be continued, but when the contract was negotiated the parties evidenced a willingness to let such practices continue as before under the unilateral administration of the Respondent without contractual obligation; so if they were to be eliminated, they should have been eliminated on a nondiscriminatory basis.

I find no merit in the Respondent's suggestion that it might have been subject to an unfair labor practice charge if it had given the employees represented by the Union a bonus in 1953. The whole attitude of the Union was that it wanted the employees to have the bonus and was willing that the Respondent continue its past practice. On such facts no unfair labor practice could possibly result from a continuation of past practices.¹²

The Respondent argues that "neither the individual employees nor the Union on their behalf ever made a claim to respondent for sick leave not paid or bonuses not paid under Article VI of the 1953 contract nor were those subjects taken up through grievance procedure of Article XII of

¹²Texas Foundries, Inc., 101 NLRB 1642; Bishop, McCormick & Bishop, 102 NLRB 1101.

that contract." Article VI of the contract reads: "Any claim for wages must be presented to the Employer in writing within thirty (30) days of the day employee is paid for the period in which wages are claimed." Pay for time absent on account of sickness can be called wages; so a deduction from pay for time lost on account of sickness could give rise to a claim for wages for which notice of claim should have been given under Article VI. But although the bonus had been considered a form of compensation for services rendered, Section VI, of the contract seems inapplicable to any claim for bonus because the language of that section apparently contemplates a claim of short payment of periodic wages rather than of nonpayment of an annual bonus. However, even if the clause in question were applicable, it would apply to a contractual claim; it would not provide a defense to an unfair labor practice charge. If it is to be considered at all in this case, it would be in connection with the remedy. And if considered in connection with the remedy, the limitation agreed to by Article VI would apply only until such time as the Respondent rejected the Union's oral request for payment, because it is a rule of law too well established to require citation of authority that the law will not require the performance of a useless act as a condition precedent. When the Respondent told the Union that it would not pay sick leave or bonus, the Union was not obligated to disbelieve such statement and to file a written claim anyway. I have already stated that when a grievance stems from an

unfair labor practice, resort to the processes of the Board is not foreclosed by the fact that the grievance procedure was also available. Not only does failure to resort to the grievance procedure of the contract not deprive the Board of jurisdiction, but it does not constitute a defense to the merits of the unfair labor practice charge. Also, in view of the Respondent's position that it was not required to and would not pay the bonus or sick leave, the argument that the employees or the Union should nevertheless have followed a useless course through the grievance procedure is unimpressive.

The Respondent argues that, before a finding of unlawful discrimination can be made, it must be proved that the Respondent had an illegal motive to discourage union membership. And, it argues, the very fact that the Respondent entered into a contract providing for an increase in wage rates and for a union shop negatives any intent to undermine the Union. Where it is not evident that an employer's act was designed to differentiate between employees—that is, where he clearly intends to discourage sentiments, proof of motive may be a necessary element of an unfair labor practice case. But where it is evident that an employer's conduct is based on a differentiation between union and nonunion employees—that is, where he clearly intends to discriminate—it is not necessary to show that the employer intended such discrimination to have the effect of discouraging union membership so long as that would be the natural tendency of the dis-

crimination.¹³ No dispute exists here that the Respondent intended to discriminate between the employees represented by the Union and those not so represented with respect to bonus and sick leave. No unfair labor practice would be found even so if the Respondent proved either a justification or an excuse for the discrimination. Such a defense might be established if the Union had authorized the discrimination expressly or by necessary implication. On the facts of this case, I find neither. All the evidence pointed to an understanding that bonus and sick leave would be omitted from the contract in order to allow them to be handled as they had been in the past on a nondiscriminatory basis. The tendency of the discrimination here to discourage union membership was the same as if the Respondent had expressly said, "You may have union representation if you wish, but to show you that you would be better off without it we will terminate the sick leave and bonus which you formerly received as a favor from us and we will give you nothing that we do not have to give." I conclude and find, therefore, that, although the Respondent has not refused to bargain as alleged in the complaint, it has, by a withholding of the 1953 bonus and sick leave from employees in the collective bargaining unit, while granting both benefits to employees outside the unit, discriminated in regard to terms

¹³Radio Officers' Union v. N. L. R. B., 347 U. S. 17, 33 LRRM 2417 (under discussion of Gaynor Case, II, B.).

and conditions of employment of its employees in violation of Section 8 (a) (3) of the Act and derivatively of Section 8 (a) (1) of the Act.

II. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent as set forth in Section I above, to the extent that they have been found to constitute unfair labor practices, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

III. The Remedy

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8 (a) (3) and (1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Since I have found that the Respondent discriminated against employees in the bargaining unit in regard to terms and conditions of employment by withholding from them the customary bonus, while paying it to substantially all other employees, I shall recommend that it take action to place the employees in the same situation they would have been in, absent the discrimination. As the bonus is usually granted to employees but with some exercise of discretion not influenced by union mem-

bership or representation, the Respondent should determine the merits of employees in the unit to a bonus for 1953 on the same nondiscriminatory basis that it used in determining whether or not employees outside the unit should receive a bonus for that year and it should pay to employees in the unit the amount of any bonuses so determined.

Since the 1953 contract has expired and as the 1954 contract provides for a definite number of days of sick leave, no purpose would be served by an order to grant sick leave in the future. But to the extent that the employees in the bargaining unit suffered loss of pay on account of sickness as a result of the Respondent's discrimination, I shall recommend that the Respondent make them whole. As previously stated, however, the failure of the employees to make claims for wages for such periods of absence within the 30-day period agreed to in the contract would have limited their contractual right to reimbursement. I believe it would effectuate the purposes of the Act to follow the limitation agreed to in the contract with respect to deductions for sick leave for the period during which the employees failed to assert their claims. The first notice to the Respondent of any claim to compensation for sick leave was made in Baldwin's telephone conversation on January 4, 1954. For the period from January 4, 1954, to the end of the 1953 contract, then, the Respondent should make whole the employees in the bargaining unit for any loss of pay suffered by them as a result of the discrim-

inatory refusal to compensate them for time not worked on account of sickness by paying them for such time at their regular rate of pay on the same nondiscriminatory basis that it used in paying sick-leave compensation to employees outside the bargaining unit. By "paying them on the same nondiscriminatory basis" as employees outside the unit is meant with the same discretionary limitations as to maximum duration of absent time for which payment was allowed and the like.

Upon the foregoing findings of fact and the entire record in the case, I make the following:

Conclusions of Law

1. The Respondent is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

3. On June 26, 1954, and at all times material thereafter, the Union has been the statutory bargaining representative of all employees in the appropriate unit within the meaning of Section 9 (a) of the Act.

4. All warehouse employees of the Respondent, construction machinery, equipment and parts sales and service plant in Boise, Idaho, including warehousemen, shipping and receiving clerks, price clerks, counter men, order clerks, delivery men, inventory clerks and warehouse filing clerks, exclud-

ing all managers, assistant managers, foreman, confidential secretaries, office clerical employees, outside salesmen, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

5. By discriminating in regard to terms and conditions of employment of its employees in the bargaining unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

6. By the conduct in paragraph 5, above, the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

7. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

8. The Respondent has not refused to bargain with the Union within the meaning of Section 8 (a) (5) of the Act.

Recommendations

Upon the basis of the above findings of fact and conclusions of law, I recommend that:

The Respondent, Intermountain Equipment Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in General Teamsters, Warehousemen and Helpers, Local Union 483 or any other labor organization of its employees by discriminating in regard to the terms or conditions of their employment.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist General Teamsters, Warehousemen and Helpers, Local Union 483 or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Make whole those employees in the collective bargaining unit, above described, who, during the term of the 1953 contract, suffered a loss as a result of the Respondent's discrimination in withholding bonus and sick leave by paying each of them a sum of money equivalent to that which he would have been paid, absent the discrimination against them in the manner described in the section above-entitled "The remedy."

(b) Post at its place of business in Boise, Idaho, copies of the notice attached hereto and marked "Appendix." Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Nineteenth Region in writing within twenty (20) days from the date of service of this Intermediate Report of what steps the Respondent has taken to comply herewith.

It is further recommended that the complaint be dismissed insofar as it alleges that the Respondent refused to bargain with the Union.

It is also recommended that, unless Respondent within twenty (20) days from the date of receipt of this Intermediate Report, notifies the said Regional Director in writing that it will comply with the foregoing recommendations, the Board issue an order requiring Respondent to do so.

Dated this 8th day of December, 1954.

/s/ JAMES R. HEMINGWAY,
Trial Examiner.

Appendix

Notice to All Employees Pursuant to

the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not discourage membership in General Teamsters, Warehousemen and Helpers, Local Union 483, or in any other labor organization of our employees, by discriminating among our employees in regard to terms or conditions of employment.

We Will Not in any manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist General Teamsters, Warehousemen and Helpers, Local Union 483, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act, as amended.

We Will make whole the employees in the bargaining unit covered by the 1953 contract with the above-named union for any loss suffered by them as a result of the discrimination against them.

All our employees are free to become or remain members of the above-named union or any other labor organization. We will not discriminate against any employee because of membership in or activity on behalf of any such labor organization.

Dated

INTERMOUNTAIN EQUIP-
MENT COMPANY,
(Employer.)

By,
(Representative.) (Title.)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced or covered by any other material.

[Title of Board and Cause.]

EXCEPTIONS TO INTERMEDIATE REPORT
AND RECOMMENDED ORDER, FIND-
INGS OF FACT, CONCLUSIONS OF LAW,
AND RECOMMENDATIONS OF THE
TRIAL EXAMINER

Comes now the Intermountain Equipment Com-
pany, Respondent in the above-entitled matter, and
excepts to the Intermediate Report and Recom-

mended Order of the Trial Examiner dated December 8, 1954, and transferred and filed before this Honorable Board on the same date, in the following particulars:

Exceptions to Rulings on Motions

1. Excepts to the denial of Respondent's motion (IR 2:43*) to strike the testimony of Alvin M. Stewart (Tr. 290-293) and the testimony of Roy F. Buntin (Tr. 293-297), which testimony was offered in rebuttal by the charging Union. Further excepts to the statement of the Trial Examiner (IR 2:47-49) to the effect that such testimony tended to cast doubt on Respondent's good faith previously attested by its own witnesses. The record clearly shows (Tr. 177-179, 237-238) that Respondent's good faith and cooperative attitude toward the Union in collective bargaining was attested to by General Counsel's own witnesses. Consequently, such rebuttal testimony, if allowed and given the inference suggested by the Trial Examiner, impeaches previous testimony of General Counsel's own witnesses. The rebuttal testimony referred to is also subject to the objection that it is so uncertain and vague as to have no probative value; that the questions eliciting said testimony were grossly leading; and that said testimony is otherwise incompetent, irrelevant, and immaterial. Re-

*IR 2:43 refers to Intermediate Report, page 2, line 43; TR. 290-293 refers to Transcript of record, pages 290 through 293.

spondent's motion to strike should have been granted.

2. Excepts to the denial by the Trial Examiner of that portion of Respondent's motion to dismiss the complaint as to the violations of Sections 8(a) (1) and (3) of the Act (IR 2:50). This exception is based upon the same reasons as the exceptions hereinafter made to the Trial Examiner's Findings of Fact and Conclusions of Law relative to the alleged discrimination.

Exceptions to Findings of Fact

1. Excepts to the finding of the Trial Examiner to the effect that Respondent's bonus policy was in practice equivalent to about one month's wages after a minimum of a year's employment (IR 4:2-5). The testimony of Mr. Dufford is undisputed (Tr. 102-106) to the effect that payment of bonuses to Respondent's employees was completely discretionary with management both as to payment of the bonus and the amount of bonus to the individual employees if paid; that many factors were considered by management in determining whether or not a bonus would be paid to a particular employee, and if so, how much. There is no evidence to the contrary. The Trial Examiner's inference (IR 4:8-9) that bonus payments in size and regularity were in fact routine is unsupported by substantial evidence in the record considered as a whole.

2. Excepts to the finding of the Trial Examiner (IR 4:30-38) inferring that Respondent had a sick leave policy; that the Company was proud of its policy, and that nothing in the near future would justify changing the policy. The basis for this finding appears to be the testimony of Stewart (Tr. 200). Mr. Dufford testified that the Company had no policy with regard to sick leave and that if the employees were paid when actually off work sick, it was the result of the discretion of individual supervisors rather than Company policy with regard to the same (Tr. 113-118). Stewart's testimony is unsupported by the testimony of Baldwin and Buntin who were present at the meeting at which the statements were allegedly made by Mr. Dufford, and Mr. Dufford has denied the same, affirmatively testifying that the Company had no sick leave policy.

3. Excepts to the finding of the Trial Examiner (IR 5:32) to the effect that employees approved the contract. It is uncontradicted that the employees approved the contract without bonus and sick leave provisions contained therein. The Trial Examiner's omission of the underlined words above distorts the inferences to be drawn from the employees' approval of the contract.

4. Excepts to the finding of the Trial Examiner (IR 5:43-44) wherein he infers that the practice of giving sick leave continued except in the department covered by the Union contract. There is no support for this inference in the record. To the

contrary Mr. Dufford has testified undisputedly that the Company did not have a sick leave policy (Tr. 114), and that employees not in the unit had no assurance of sick leave benefits (Tr. 129).

5. Excepts to the finding of the Trial Examiner (IR 6:14-15) to the effect that the 1954 contract provided for sick leave but not bonus. This finding is incomplete in that it does not state that which the evidence clearly shows, that is, that during the 1954 negotiations the Union again proposed to the Company a sick leave clause and a bonus clause; that both were thoroughly discussed during negotiations and that a sick leave clause was adopted but that a bonus clause was not agreed to and that the Union withdrew its demands for a bonus clause in the 1954 contract (Tr. 236, 237).

6. Excepts to the finding of the Trial Examiner (IR 6:49-54) to the effect that the 1954 negotiations looked only to the future. It is undisputed that prior to the time of the 1954 negotiations the Union had filed the original charge and the amended charge upon which the complaint in this matter was predicated. Although the Employer desired to have the matter of these charges disposed of prior to the 1954 negotiations, this in fact had not been accomplished and both the Company and the Union were aware of the existence and pendency of those charges during negotiations. That the Union voluntarily withdrew its bonus demands during the 1954 negotiations clearly shows that the matter was within the contemplation of the parties and that the Union waived any claim to bonuses.

This, of course, substantially parallels the proceedings during the 1953 negotiations and negatives the alleged discrimination while substantiating Respondent's contention that bonuses were not included in the contract because other substantial benefits were granted in the contract which were not given to the Respondent's other employees.

7. Excepts to the attempt of the Trial Examiner (IR 9:19-22, 9:41 to 10:1) to explain away the opinion of the United States Court of Appeals for the 8th Circuit in the case of NLRB vs. Nash-Finch Company. The Trial Examiner completely misconstrues and distorts the plain wording and meaning of the Circuit Court's opinion in that case.

8. Excepts to the conclusion of the Trial Examiner (IR 9:59-61 footnote) to the effect that the parties understood that sick leave and bonuses were not intended to be covered by the "special privileges clause" proposed by the Union during the 1953 negotiations and rejected by the Company. The record fails to support this conclusion.

9. Excepts to the language of the Trial Examiner (IR 10:1-41) in discussing the Nash-Finch decision for the reason that said language is unintelligible and meaningless.

10. Excepts to the language of the Trial Examiner (IR 11:4-21) in further attempting to distinguish and explain away the Nash-Finch decision. This language is immaterial to the decision of the

issues herein involved, is unintelligible, and is contrary to law.

11. Excepts to the finding of the Trial Examiner (IR 11:34-38) purporting to set forth Mr. Dufford's reasons for withholding bonus payments from the employees in the bargaining unit as being incomplete and misleading. Mr. Dufford testified, and his testimony was undisputed, that the employees in the bargaining unit were not included in the bonus payments made in 1953 because the employees in the unit were covered by a collective bargaining contract which bound the Company irrevocably to certain terms and conditions of employment (Tr. 286), which binding commitments did not exist with the Company's other employees (Tr. 248); that payment of the bonuses could constitute a violation of the contract and could conceivably constitute an unfair labor practice (Tr. 286, 287). Mr. Dufford also testified that as a result of the 1953 negotiations which culminated in a written collective bargaining agreement, the employees received a wage increase of approximately twenty-six cents per hour (Tr. 246), and that the other employees of the Company, those not in the bargaining unit, did not receive comparable wage increases (Tr. 250, 264, 276). Mr. Dufford further testified, and his testimony is undisputed, to the effect that the 1953 contract bound the Company to provide certain fringe benefits such as paid holidays and specified vacations, and that the other employees of the Company, those not in the bargaining unit, did not re-

ceive any guarantee of such fringe benefits (Tr. 248). All of these factors, that is, the wage increases and the guarantee of fringe benefits and other working conditions granted to the employees in the unit but not to the other employees of the Company, as well as those factors mentioned by the Trial Examiner, were the reasons for the Company's decision not to pay bonuses to the employees in the unit. There is no evidence to the contrary.

12. Excepts to the statement of the Trial Examiner (IR 11:52-60) to the effect that the advantages to the employees in the bargaining unit as set forth in the contract were in fact balanced as to the Company's other employees. The Trial Examiner attempts to minimize the twenty-six cents wage increase by emphasizing that there was a reduction in the work week, apparently operating on the theory that an hourly wage increase is not a benefit unless it results in increased weekly take-home pay. Actually and in fact it is a fundamental and elementary principle that a wage increase can consist either of more money for the same work or the same money for less work. And certainly the Company by paying the same weekly take-home pay for fewer hours of work incurs a substantial economic detriment.

13. Excepts to the assumption of the Trial Examiner (IR 12:2-4) to the effect that employees not in the unit enjoyed shorter working hours with no reduction in pay. The evidence is to the contrary (Tr. 266:7-9).

14. Excepts to the finding of the Trial Examiner (IR 12:8-9) to the effect that except for hourly wage increase the 1953 contract did not provide benefits not previously enjoyed. This is directly contrary to the evidence. The 1953 agreement which was introduced into evidence as General Counsel's Exhibit 3 clearly shows that many other benefits such as paid holidays, vacations, seniority provisions, grievance processing procedure, and union shop provisions were provided. None of these had previously been guaranteed to any employees of the Company.

15. Excepts to the statement of the Trial Examiner (IR12:34-39) to the effect that the Company's position is that it had a right to withhold sick leave because it was not included in the contract after negotiations in spite of the alleged statements of Dufford during the negotiations that sick leave would be continued. This statement is contrary to the evidence in that it ignores the facts that the Company did not have an established sick leave policy for any employees prior to the 1954 contract and that Mr. Dufford unconditionally denied making the statements attributed to him by the Union's witnesses (Tr. 280).

16. Excepts to the conclusion of the Trial Examiner (IR 12:53-59) to the effect that Respondent's discretion with regard to bonus would be based on its ability to pay and on its evaluation of individuals rather than on the question of Union representation or nonrepresentation. There is no evidence in

the record to support the suggestion that Respondent's discretion in bonus payments would be based on its ability to pay and there is no evidence in the record to support a finding that Respondent's decision not to pay bonuses to employees in the bargaining unit was based upon the question of Union representation. The record is replete with evidence to the contrary.

17. Excepts to the language of the Trial Examiner (IR 13:8-28) to the effect that Respondent discriminated against employees in the bargaining unit with regard to bonus and then attempted to rationalize its discrimination upon the basis of the contract. There is no evidence in the record to support this inference and Mr. Dufford's testimony is uncontradicted as to the basis for the Company's decision with regard to bonuses and sick leave.

18. Excepts to the Trial Examiner's finding (IR 13:30-36) disregarding Respondent's contention that it might have been subject to an unfair labor practice charge if it had paid a bonus to employees in the bargaining unit in 1953. The language as used by the Trial Examiner shows that his entire thinking in this regard is predicated on the proposition that no one other than the charging Union (Local 483) has the right, power, or privilege to file an unfair labor charge. There is evidence in the record to the effect that some of the other employees of the Company might properly be represented by a labor organization in a unit found to be appropriate by the Board. Consequently, some other Union

seeking to represent such employees conceivably could file charges against the Company on the theory that by granting substantial wage increases and other benefits as well as bonuses, even though not included in the collective bargaining agreement, the Company would thereby interfere with the rights of its employees by encouraging or discouraging membership in one Union as against the other.

19. Excepts to the Trial Examiner's statements (IR 13:38 to 14:16) to the effect that Respondent argues that the wage claim provision and the grievance provision of the 1953 contract constitute a defense to the action. This clearly misstates the Respondent's position. Respondent does not contend that the 1953 contract, and particularly the wage claim and grievance provision thereof, constitute a defense to this action, but rather Respondent argues that the failure to present claims by use of this machinery clearly shows a state of mind on the part of the employees and the Union to the effect that they do not actually consider the 1953 bonus payment and the alleged sick leave payments to constitute money or wages due them. This is perfectly consistent with the Respondent's position that there was no commitment on the part of the Company by written contract or otherwise to make such payments to employees in the unit.

20. Excepts to the statements of the Trial Examiner (IR 14:19-52) to the effect that Respondent clearly intended to discriminate against the Union employees and that there was no dispute as to that

point and that Respondent has failed to prove either a justification or an excuse for the discrimination. This language is contrary to the testimony in the record, there is no evidence of intent or desire to discriminate, counsel for the General Counsel has failed to show any anti-Union feeling or motive, Respondent has established its reasons for the handling of bonuses and sick leave as they were done, and these reasons are without contradiction. Union witnesses testified that the Company never refused to bargain (Tr. 65) and was friendly toward the Union (Tr. 177, 179, 238). Further, the terms of the 1953 and 1954 agreements and the course of negotiations prior to both of those contracts clearly show the good faith of the Company.

21. Excepts to the finding of the Trial Examiner (IR 14:57 to 15:3) to the effect that activities of the Respondent tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce. There have been no labor disputes between the charging Union and the Company; the relationship between the Union and the Company has been an outstanding example of peaceful labor management relations since the Union was certified. The history of collective bargaining and the comparative speed in which written agreements have been established, both in 1953 and 1954, together with the substantial concessions given by the company in both contracts, clearly show that no activities of the Company have resulted or tend to result in labor disputes.

Exceptions to the Remedy

1. Excepts to the findings and recommendation of the Trial Examiner (IR 15:7-48) to the effect that Respondent has engaged in unfair labor practices and the remedy therefor should be to pay to the employees in the unit sick leave and bonuses as more particularly set forth in the provisions of the Intermediate Report referred to. Since the findings of the Trial Examiner to the effect that the Respondent has committed unfair labor practices are not supported by substantial evidence in the record considered as a whole as more particularly set forth hereinabove, the entire remedy recommended by the Trial Examiner is improper. It should be to dismiss the complaint in its entirety.

Exceptions to Conclusions of Law

1. Excepts to the conclusion of the Trial Examiner (IR 16:1) to the effect that the Union has been the bargaining representative of the employees in the unit since June 26, 1954. This is contrary to the evidence.

2. Excepts to conclusions 5, 6 and 7 (IR 16:15-26). These conclusions are improper as more particularly set forth hereinabove.

Exceptions to Recommendations

1. Excepts to the recommendations of the Trial Examiner as set forth in the Intermediate Report (IR 16:33 to 17:34). The proper recommendation should be to dismiss the complaint.

**Exceptions to Trial Examiner's Failure
to Make Certain Findings**

1. Excepts to the failure of the Trial Examiner to find that prior to the 1954 contract Respondent had no established sick leave policy with regard to any of its employees (Tr. 114).

2. Excepts to the failure of the Trial Examiner to find that the Respondent at all times acted in good faith in its negotiations with the Union (Tr. 65, 237, 238) and that the Respondent at no time displayed any anti-Union feeling.

3. Excepts to the failure of the Trial Examiner to find that the Union and the Company bargained in good faith during both the 1953 and 1954 negotiations with regard to bonus and sick leave, that prior to the 1954 contract there was no agreement to pay bonus and sick leave, and that during the 1954 negotiations the Union withdrew its demand for bonuses (Tr. 237).

Wherefore, Respondent respectfully prays that the complaint against it be dismissed, and for such other and further relief as may be just and proper.

THOMAS L. SMITH,

LOUIS H. CALLISTER, and
NATHAN J. FULLMER,

By /s/ NATHAN J. FULLMER,
Counsel for Respondent.

Certificate of Service attached.

United States of America
Before the National Labor Relations Board

Case No. 19-CA-948

INTERMOUNTAIN EQUIPMENT COMPANY,
and

GENERAL TEAMSTERS, WAREHOUSEMEN
AND HELPERS LOCAL UNION 483

DECISION AND ORDER

On December 8, 1954, Trial Examiner James R. Hemmingway issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that the complaint be dismissed in those respects. Thereafter, the Respondent filed exceptions to the Intermediate Report together with a supporting brief.¹ The General Teamsters, Warehousemen and Helpers Local Union 483, hereinafter called the Union, filed a brief in

¹The Respondent's request for oral argument is denied as the record, the exceptions and the briefs, in our opinion, adequately present the issues and the positions of the parties.

support of the Intermediate Report. The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs and the entire record in the case and hereby adopts the findings, conclusions and recommendations of the Trial Examiner:

For a number of years prior to 1953, the Respondent had regularly paid year-end bonuses to substantially all of its employees, including those currently represented by the union. It had also maintained a practice of compensating its employees for absences due to sickness. In June, 1953, the Union was certified by the Board as the exclusive bargaining representative for the warehouse employees and the parties commenced negotiations for a collective bargaining agreement covering these employees. During negotiations the Union proposed, among other things, contract clauses providing for year-end bonus payments equivalent to one month's wages and guaranteed paid sick leave of 6 days per year. The Respondent opposed both on the grounds that the payment of bonuses should remain within the prerogative of management and that if it would guarantee a fixed amount of sick leave the employees would take the maximum amount of time allocated for sickness whether or not they were sick. However, as the Union expressed concern that the Respondent's existing policies on these matters might be changed absent the contract provisions, the

Respondent assured the Union that it saw nothing in the near future that would justify changing the sick leave policy and that it would "treat all employees in [its] employment the same as far as bonuses and sick leave were concerned." Relying upon these representations the Union dropped both demands. In presenting the contract to the employees for ratification, the Union restated the Respondent's assurances concerning bonuses and sick leave. A collective bargaining agreement was signed in July, 1953. Thereafter, without informing the Union, the Respondent immediately instructed the supervisors of the employees represented by the Union to adhere strictly to the terms of the contract and not to give anything except that which was guaranteed by the contract; as a result only time shown as worked by the time clock was paid for and absences because of sickness were no longer approved for compensation. Paid sick leave was continued, however, for those employees not in the unit represented by the Union. Further, in December, 1953, the Respondent distributed the usual year-end bonuses but only to employees outside the bargaining unit represented by the Union.

We agree with the Trial Examiner's findings that this disparate treatment concerning bonuses and sick leave had the inherent effect of discouraging union membership and therefore constituted a violation of Section 8 (a) (3) and (1) of the Act, even absent independent evidence of the Respondent's anti-union

motivation. As the Supreme Court in the Radio Officers' case² said:

This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct.

Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage [or discourage] is sufficiently established.³

In this case, the Respondent assured the Union that it would not discriminate against the represented employees with respect to bonuses and sick leave. As a result the Union dropped its demands for contractual provisions covering those items, and passed on to the employees the Respondent's assurances, as could be expected. After the contract

²Radio Officers' Union v. N.L.R.B., 74 S. Ct. 323; 33 LRRM 2417.

³If the discussion of the Radio Officers' case in our dissenting colleague's opinion is intended to suggest that the Court did not lay this principle down as one of general application to all discrimination cases, we cannot agree.

was signed, however, the Respondent, without explanation of a non-discriminatory reason for disparate treatment if in fact there was one, and without discussion with the Union, summarily deprived the represented employees of bonuses and paid sick leave while continuing such benefits for the employees not covered by the contract. Under the circumstances we conclude that the effect of this disparate treatment in view of the Respondent's previous assurances that all employees would be treated alike was to cause the represented employees reasonably to believe that the Respondent was punishing them for their union adherence, a result that necessarily discourages union membership. The Respondent must be held to have intended this foreseeable consequence of its conduct irrespective of its actual motivation.

Our dissenting colleague's assertion that the Respondent's previous assurances that all employees would be treated alike can be given no weight in this case absent an inference that they were given as "part of a scheme" to pave the way for reprisals against union members, plainly is not a correct statement of law. These statements were part of the context in which the employer acted and cannot be ignored in deciding whether his disparate action had the natural consequence of discouraging union membership whether the statements were made in all sincerity or not. Justice Frankfurter's concurring opinion in the *Radio Officers'* case makes this clear

when he explicitly defines the scope of the decision in these words:

On the basis of the employer's disparate treatment of his employees standing alone, or as supplemented by evidence of the particular circumstances under which the Employer acted, it is open for the Board to conclude that the conduct of the employer tends to encourage or discourage union membership, thereby establishing a violation of the statute. (Emphasis supplied.)

Moreover, we believe that the inference that the Respondent intended to discriminate because of union membership is buttressed by the circumstances. Thus we note that immediately after signing the contract the Respondent deprived the represented employees of their paid sick leave. The immediacy of its action, totally unexplained, would give rise to an inference that Respondent intended to discriminate because of union membership. While several months elapsed before the disparate bonus payments, in the light of the prior action on the sick leave, and the absence again of any explanation to the employees, the same inference could be drawn. It seems unlikely that an employer motivated by no anti-union considerations would deprive only his represented employees of substantial benefits given unrepresented employees and which the former had been led to believe would be continued, without first explaining to them or their representative why the changes were made. The failure to discuss or ex-

plain before acting contrary to its prior statements casts serious doubt on the bona fides of the Respondent's actions and the purity of the motive behind them.

For these reasons we find that the Respondent violated Section 8 (a) (3) and (1) of the Act by discontinuing bonuses and paid sick leave for the employees represented by the Union.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that Intermountain Equipment Company, its officers, agents, successors, and assigns shall:

1. Cease; desist from:

(a) Discouraging membership in General Teamsters, Warehousemen and Helpers, Local Union 483 or any other labor organization of its employees by discriminating in regard to the terms or conditions of their employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist General Teamsters, Warehousemen and Helpers, Local Union 483 or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or pro-

tection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make whole those employees in the collective bargaining unit described in the Intermediate Report, who, during the term of the 1953 contract, suffered a loss as a result of the Respondent's discrimination in withholding bonus and sick leave by paying each of them a sum of money equivalent to that which he would have been paid, absent the discrimination against them in the manner described in the section entitled "The remedy," in the Intermediate Report;

(b) Preserve and make available to the Board or its agents upon request all records necessary to analyze the amounts of bonuses and sick leave payments due under the terms of this Order;

(c) Post at its place of business in Boise, Idaho, copies of the notice attached to the Intermediate Report and marked "Appendix."⁴

⁴This notice shall be modified by substituting the words "A Decision and Order" for the words "The Recommendations of a Trial Examiner." In the event this Order is enforced by a decree of a United

Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Nineteenth Region in writing within ten (10) days from the date of this Order what steps the Respondent has taken to comply herewith.

It Is Further Hereby Ordered that the Complaint insofar as it alleges that the Respondent violated Section 8 (a) (5) be, and it hereby is, dismissed.

Dated, Washington, D. C., Dec. 16, 1955.

ABE MURDOCK,
Member;

IVAR H. PETERSON,
Member,

[Seal]

NATIONAL LABOR RELATIONS BOARD.

States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

Boyd Leedom, Chairman, dissenting:

I would not find that the Respondent violated Section 8 (a) (3) of the Act by discontinuing sick leave privileges and year-end bonus payments to its represented employees while continuing such benefits for its unrepresented employees.

It is well settled that to establish a violation of Section 8 (a) (3) of the Act it is necessary to show not only that the employer discriminated but also that the purpose of the discrimination was to encourage or discourage union membership or activity. It is true that, as the Supreme Court stated in the *Radio Officers* case⁵, such purpose may be inferred, in the absence of any direct evidence of motivation, where the discrimination is of such a nature that it inherently encourages or discourages union membership. In that case the Court affirmed a Board finding that the granting by an employer of certain benefits to union members while denying them to other employees in the same bargaining unit and doing the same work violated Section 8 (a) (3). The Court held, in effect, that it was so clearly foreseeable that such contrasting treatment of union and nonunion employees would encourage union membership that it was unnecessary to adduce any further proof that the employer intended such encouragement. The Court indicated also that under such circumstances an employer's disclaimer

⁵*Radio Officers' Union v. N. L. R. B.*, 74 U. S. Ct. 323.

of any intent to encourage would be unavailing. The Court made it clear that its decision was limited to the facts before it and it was not passing on the legality of preferred treatment of union members where they alone were represented by the union. Thus it appears that the Radio Officers case leaves open the question of the legality of preferred treatment of nonunion members not represented by any union, which is, in part, the issue here.

From the foregoing it appears that Radio Officers, insofar as here pertinent, holds merely, in effect, that the Board may infer intent to encourage or discourage union membership (a) where there is no countervailing evidence other than the employer's naked disclaimer of any such intent⁶, and (b) where the treatment of union employees is obviously more favorable than the treatment of nonunion employees.⁷ In my opinion, neither of these conditions is present here.

⁶This aspect of the majority opinion in Radio Officers is highlighted in Justice Frankfurter's concurring opinion in that case, which reads in part: " * * * concededly a raise given only to union members is prima facie suspect; but the employer, by introducing other facts may be able to show that the raise was so patently referable to other considerations, unrelated to his views on unions * * * that the Board could not reasonably have concluded that his conduct would encourage or discourage union membership.

⁷While the Court left open the question whether it would extend the rule of Radio Officers to the case where the union, as in the instant case, represents only its members, it will be assumed for the

As to (a), there is persuasive evidence, apart from the Respondent's disclaimer, that it had no anti-union motivation in continuing the benefits in question for nonunion employees, while denying them to union employees. The Respondent, in 1953, executed a contract with the Union which not only guaranteed substantial new benefits to its members but also granted the Union the protection of a union shop clause. It is difficult to believe that the respondent would have required its employees to join the Union if it were seeking to undermine it. As against this, the only evidence, other than the alleged disparate treatment, itself, that has been cited as indicating the Respondent's antiunion motivation is the fact that the Respondent made statements at the contract negotiations which tended to create the impression that it would continue the bonus and sick leave for all employees and that the Respondent failed to give the Union any advance notice or explanation of its decision to discontinue those benefits. It is not clear to me, however, how this conduct of Respondent, even if we assume it to be equivocal, can overcome the convincing and unequivocal proof of the Respondent's nonhostility to the Union implicit in the grant of a union shop clause. Moreover, any disparity between the Respondent's statements during negotiations and its

purpose of the ensuing discussion that the fact the Union in the instant case did not represent the nonmember employees involved does not, in itself, preclude the application of Radio Officers hereto.

conduct thereafter seems to me explainable by the fact that such statements were made at the outset of the negotiations, before the Union had presented its demand for a 26c an hour wage increase. The Union's insistence on such a large increase may well have caused the Respondent, for legitimate economic reasons, to alter its plans with regard to continuing the noncontractual benefits. Accordingly, even apart from the implications of the grant of a union shop here, I would be unwilling to infer that the oral assurances given by the Respondent in the early stages of the negotiations were part of a scheme to pave the way for a program of reprisal against the Union and its members. If, then, they were not part of such a scheme, it seems to me they are not entitled to any weight in appraising the Respondent's motivation.

As to (b), it is not established that the benefits conferred by the Respondent on its unrepresented employees (year-end bonus and paid sick leave) exceeded in aggregate value the benefits conferred on the represented employees by the 1953 contract (i.e., a 26 cent hourly raise, paid holidays and vacations, seniority rights, premium pay for overtime). On the basis of a 40-hour week, the wage increase alone was worth \$500 a year to each Union member. What little evidence there is in the record on this point suggests that the value of the bonus may have been substantially less than this amount. As to the relative value of the sick leave privilege,

on the one hand, and the various fringe benefits conferred by the Employer on the organized employees, the record is silent. In any event, there is no basis in the record for finding that the treatment of the unorganized employees was, in the aggregate, obviously more favorable than the treatment of the organized employees.

It is true, if one considers in isolation the fact that the Respondent withdrew bonus and sick leave from the organized employees but not from the unorganized employees, such conduct standing alone might warrant finding an obvious disparity in treatment. Viewing, the respondent's withdrawal of these benefits in the context of all other relevant circumstances, however, such as what it and the Union agreed to in the contract, one cannot escape the conclusion that in essence what the respondent did was to guarantee to its organized employees a substantial wage increase and other benefits in lieu of the pre-existing bonus and paid sick leave, while continuing the bonus and sick leave for the unorganized employees who failed to receive any wage increase or other new fringe benefits. If an employer grants a 10 cents per hour raise to his organized employees, I should think he would be free, if not required, to extend the same increase to his unorganized employees.

By the same token, when an employer grants to his organized employees alone a wage increase in lieu of an existing bonus he should be free to continue to pay the bonus to his unorganized em-

ployees. That is essentially what happened here. Finally, where, as here, a union acquiesces in management's insistence upon omitting from a contract any reference to existing benefits, I believe that the only realistic view of the matter is that the union and its members have been put upon notice that management is reserving the right to discontinue such benefits.⁸ As no arrangement was made in the contract for a continuing bonus or sick benefits, it follows that the actual exercise of the right to discontinue something not included in a contract is a foreseeable result of the collective bargaining process. It is a risk inherent in that process which the Union and its members assumed when they elected to engage in collective action. For these reasons, I would not find that the Respondent's action in discontinuing the bonus and sick leave, even if patently disparate, inherently discouraged union membership.

Accordingly, I would not find any violation of Section 8 (a) (3) in the instant case.

Dated, Washington, D. C., December 16, 1955.

BOYD LEEDOM,

Chairman, National Labor
Relations Board.

⁸I do not mean here to pass upon the question whether the exercise of such a right would violate Section 8 (a) (5) of the Act. I am merely attempting to appraise the realities of the situation.

Before the National Labor Relations Board,
Nineteenth Region

Case No. 19-CA-948

In the Matter of:

INTERMOUNTAIN EQUIPMENT COMPANY,
and
GENERAL TEAMSTERS, WAREHOUSEMEN
AND HELPERS, LOCAL UNION 483.

TRANSCRIPT OF PROCEEDINGS

Tuesday, September 28, 1954

Pursuant to notice, the above-entitled matter
came on for hearing at 10 o'clock a.m.

Before: James R. Hemingway, Esq.,
Trial Examiner.

Appearances:

PAUL E. WEIL, ESQ.,

Appearing as Counsel for the General
Counsel.

THOMAS L. SMITH, ESQ., and
PHILIP A. DUFFORD,

General Manager, Intermountain
Equipment Company.

Appearing on Behalf of Intermountain
Equipment Company, Respondent.

REID W. NIELSON, ESQ., and
F. T. BALDWIN,

Secretary-Treasurer, General Teamsters,
Warehousemen and Helpers, Local
Union 483.

Appearing on Behalf of General Team-
sters, Warehousemen and Helpers,
Local Union 483, Charging Party.

Trial Examiner: The hearing will be in order.

This is a formal hearing before the National Labor Relations Board in the matter of Intermountain Equipment Company and General Teamsters, Warehousemen and Helpers, Local Union 483, Case Number 19-CA-948. The Trial Examiner conducting this hearing is James R. Hemingway.

I note the following appearances for the parties in this case:

Mr. Paul E. Weil, attorney, 19th Region, National Labor Relations Board, Seattle, Washington; appearing as counsel for the General Counsel.

Mr. Philip A. Dufford, general manager; and Mr. Thomas L. Smith, attorney, on behalf of the Intermountain Equipment Company, respondent in this case. Mr. Dufford's address is the same as that of the Intermountain Equipment Company, Broadway and Myrtle, Boise, Idaho; and Mr. Smith's address is 319 Broadway, Boise, Idaho.

Reid W. Nielson, attorney-at-law, 416 Felt Building, Salt Lake City, Utah; and Mr. F. T. Baldwin, secretary-treasurer, 208 North Sixteenth Street, Boise, Idaho, on behalf of the charging party.

Are there any other appearances that should be entered?

(No response.)

Trial Examiner: Hearing none, I will [4*] proceed.

* * *

Trial Examiner: On the record.

I wanted to call Mr. Weil's attention to the fact that there may be inherent difficulties in getting some of this material for him by virtue of the fact that the respondent might not know which employees were absent because of illness or for other reasons.

Mr. Weil: I spoke to Mr. Dufford about that, and it appears that there is no such record kept. This I, of course, was not aware of when I subpoenaed such records.

Trial Examiner: There was no record kept of those who were granted sick-leave?

Mr. Weil: That is what he informed me.

Trial Examiner: Well, that simplifies that. [21]

* * *

FRANK T. BALDWIN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your full name, please?

The Witness: Frank T. Baldwin.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Frank T. Baldwin.)

Trial Examiner: And your home address?

The Witness: 608 Shoshone.

Trial Examiner: Is that in Boise, Idaho?

The Witness: Boise, Idaho.

Q. (By Mr. Weil): What is your occupation, Mr. Baldwin?

A. Secretary-treasurer of Local 483.

Q. What union?

A. General Teamsters, Warehousemen and Helpers, A.F.L.

Trial Examiner: That is the charging Union in this case?

The Witness: Yes.

Q. (By Mr. Weil): In the course of your occupation, have you had any occasion to enter into any relationships with the respondent, Intermountain Equipment Company? A. Yes.

Q. When did you first have anything to do with the respondent company? [23]

A. It was after the election was held. The board ordered an election, and we were certified on it on or or about June 3rd.

Trial Examiner: What year?

The Witness: 1953.

Q. (By Mr. Weil): Did you take steps to initiate bargaining after your certification?

A. Yes.

Q. Did you have any bargaining meetings with the respondent? A. Yes.

Q. Will you give us, as nearly as you can recall, the—well, relate the course which bargaining took?

(Testimony of Frank T. Baldwin.)

A. Well, I met with Mr. Dufford on about June 3rd and discussed with him the procedure of the Union in drawing up the contract, the employees asking for the things they wanted in the contract; we would then have a meeting and negotiate back and forth. On July 22, 1953, I believe, we entered into negotiations, myself, two employees, Stewart and Buntin, Mr. Dufford, and Ray Fortune.

Trial Examiner: For whom? Mr. Fortune was for whom?

The Witness: For the Company.

A. He was the labor relations manager for Morrison-Knudsen Company, sitting in with Mr. Dufford. And in the morning meeting, the first meeting we held, July, I believe, 22, we generally discussed the contract provisions, went through the contract paragraph by paragraph.

Trial Examiner: When you say "the contract," had you [24] made a proposed contract?

The Witness: Proposed contract, yes.

A. (Continuing): Discussing each paragraph and explaining to the Company what we wanted and why we wanted them and so forth. Just a general meeting on the contract, the proposed contract. We adjourned and reconvened in the afternoon. We were asking for wages, union shop, a paragraph to be inserted in the contract on bonuses and sick-leave. A general discussion was held on the afternoon of the 22nd. The Employer, Mr. Dufford, was opposed to the union shop. He didn't under-

(Testimony of Frank T. Baldwin.)

stand the meaning of the union shop. We discussed that a while, and we came to the paragraph on bonuses and sick-leave, and Mr. Dufford took the position that bonuses were a company prerogative, and he didn't want them in the contract. And sick-leave, he took the position that we were asking for six days sick-leave a year, and that if a sick-leave was put in the contract, all the employees would take the sick-leave regardless of whether they were sick or not. And I explained to him that in several of our contracts where we have sick-leave, that was not true, and in one case where only 65 per cent of the employees used the sick-leave, the balance not using any sick-leave at all.

Then we adjourned and met the next day, I believe, the 23rd of July. The meeting was rather rough, if you know what I mean, negotiations. And Mr. Fortune explained the union shop also to Mr. Dufford, that the meaning of the thing—can we go off the [25] record for a minute? Do you want to use the language we used?

Trial Examiner: Ask counsel what he wants.

Mr. Weil: I think it would be better to use the language used in the conversations as much as you can recall.

A. Well, Mr. Fortune, I have dealt with him for years and years, and he was rather rough about the the thing. So on the union shop, he finally turned to Mr. Dufford and said to him, "You will never get this son-of-a-bitch to agree without a union shop. You might as well make up your mind to that

(Testimony of Frank T. Baldwin.)

right now.” And that was worked out to a certain extent. We wanted the union shop to read thirty-one days to conform with the Taft-Hartley Law, and Mr. Dufford wanted six months. We offered to settle on a 90-day period. We finally reached an agreement on his theory of six months on the union shop.

The bonus situation and sick-leave was then the issues, and Mr. Dufford again took the position that he would not put them in the contract and said that he would treat all employees in his employment the same as far as bonuses and sick-leave were concerned. And I informed him if he paid the people outside the unit bonuses and did not pay the people in the unit bonuses, that we would consider it discrimination.

And we were then talking about sick-leave, and he took the same position that it was a company policy, if they paid them one, they would pay them all. And we were arguing, myself and Mr. Fortune were arguing back and forth. To the best of [26] my memory, the conversation went like this: in the heated argument, or the rather warm argument, Mr. Fortune said to Mr. Dufford, “Well, get the monkey on this fellow’s back”—meaning myself—and I said to Mr. Fortune, “If you don’t keep your trap closed, you will get your teat in a wringer, and I will go over and organize your other employees.” And he said, “Well, you had an agreement with Mr.”—he was the vice president—“Mr. Puckett that you would not organize the other employees.”

(Testimony of Frank T. Baldwin.)

And I said, "That is right, but Mr. Puckett's dead now, and the verbal agreement went with Mr. [27] Puckett."

* * *

Trial Examiner: Who was Mr. Puckett?

The Witness: He was, I believe, the vice president of Morrison-Knudson, and the person we used to negotiate and counsel with for years, this local union.

A. (Continuing): So that stopped the argument as far as that was concerned. Then Mr. Fortune turned to Mr. Dufford and said, "I will tell you one thing, whatever this son-of-a-bitch tells you he will do, that is exactly what he will do." And then Mr. Fortune turned to me and said, "And that goes for Phil. Whatever he tells you he will do, that is exactly what he will do."

Trial Examiner: "Phil" being Mr. Dufford?

The Witness: Mr. Dufford.

A. (Continuing): So I asked for a few minutes' recess. The two employees who were sitting in on the negotiations, Speed Stewart and Roy Buntin, and I, went across the hall to consider this. And I asked them across the hall if they believed that Mr. Dufford would do what he said he would do as far as bonuses and sick-leave were concerned. And I don't remember which one of the boys said, "Well, he has always paid us a bonus, and we believe him," and the other boy chimed in and said, "Whatever he says he will do, that is what he will do." So I then dismissed it from my mind, and we

(Testimony of Frank T. Baldwin.)

came back to the office and reached an agreement on the wages and finally on the union shop, the [28] rest of the contract on holidays, and forgot about the bonuses and sick-leave.

Then we met again on the, on or about the 27th to put all the paragraphs together and finally agree on them. And then the union shop was changed, as I said a few minutes ago, from thirty days which we wanted to six months.

And Mr. Dufford and I met again in his office on the 28th, and the contract was signed. [29]

* * *

Q. (By Mr. Weil): You entered into a written contract? A. Yes, sir.

Q. Handing you what has been marked as General Counsel's Exhibit No. 3 for identification, I will ask you if that is a [30] copy of that contract?

A. Yes.

* * *

Mr. Weil: I offer General Counsel's Exhibit No. 3 for identification.

Mr. Smith: No objection.

Trial Examiner: General Counsel's Exhibit No. 3 is received in evidence.

(The document heretofore marked General Counsel's Exhibit No. 3 for identification was received in evidence.) [31]

(Testimony of Frank T. Baldwin.)

GENERAL COUNSEL'S EXHIBIT No. 3

Wage Scale and Agreement

This Agreement, Made and entered into this 27th day of July, 1953, by and between Intermountain Equipment Company, this party being referred to hereinafter as the Company, and General Teamsters, Warehousemen & Helpers of America, A. F. of L., Local Union No. 483, affiliated with the International Brotherhood of Teamsters, Warehousemen & Helpers of America, A. F. of L., this party being referred to hereinafter as the Union.

Preamble. That, Whereas, The parties hereto desire to encourage and promote a cooperative and mutually satisfactory relationship between Employer and the employees in the bargaining unit with respect to conditions of employment; to prevent strikes and lockouts and to provide for the peaceable solution of all disputes which may arise between Employer and said employees.

Now, Therefore, In consideration of the promises, covenants, and agreements of the other, each of the parties hereto agree as follows:

Article I. Recognition. The Union is hereby recognized as the sole collective bargaining representative of those employees in the unit certified under NLRB Certification No. 19-RC-1290.

Article II. Employment. All present employees, covered by this unit, as a condition of continued employment, shall become members of the Union not

(Testimony of Frank T. Baldwin.)

General Counsel's Exhibit No. 3—(Continued)
later than the sixtieth (60th) day following the effective date of this agreement. All future employees hired for work within this unit, as a condition of continued employment, shall become members of the Union not later than the sixtieth (60th) day following the beginning of their employment. Commencing with the sixtieth (60th) day of either period described above, whichever is the later, all employees present and future, shall be required to maintain a continuous membership in the Union in good standing, as a condition of employment during the life of this agreement.

Article III. Rights of Management. The products, location of business, the right to hire, fire, and promote, shall be the sole responsibility of the Company's management.

Article IV. No employee who, prior to the date of this agreement, was receiving more than the rate of wages designated and agreed upon, contained herein for the class of work in which he was engaged, shall suffer a reduction of hourly wage rate through the operation or because of the signing of this agreement.

Article V. Eight (8) hours shall constitute a day's work and forty (40) hours shall constitute a work week. All time worked over eight (8) hours in one day or forty (40) hours in one week shall be considered overtime and paid for at the rate of time and one-half.

(Testimony of Frank T. Baldwin.)

General Counsel's Exhibit No. 3—(Continued)

(a) The starting and closing time shall be at the option and discretion of the Company, except that no split shifts shall be worked.

Article VI. Any claim for wages must be presented to the Employer in writing within thirty (30) days of the day employee is paid for the period in which wages are claimed.

Article VII. Employees covered by this agreement when drafted for Military Service shall be reinstated upon their release from such service in accordance with the provisions of the Selective Training and Service Act, except that there shall be a 90-day probationary period of employment before the seniority shall apply.

Article VIII. Vacations. After one year's continuous service, an employee shall be entitled to one week's vacation at the regular rate of pay. After three (3) years of continuous service, an employee shall be entitled to two weeks vacation at the regular rate of pay.

Article IX. Holidays. The following six (6) holidays shall be granted at regular straight pay: January 1st, July 4th, Labor Day, Memorial Day, Thanksgiving Day and Christmas Day. If work is performed on any of these days, pay shall be at the rate of time and one-half. Holidays not worked shall count as time worked in computing overtime.

Article X. Seniority. When it becomes necessary to reduce the working force of the company or

(Testimony of Frank T. Baldwin.)

General Counsel's Exhibit No. 3—(Continued)
upon rehiring following a reduction in force, where merit, ability, and capacity are equal, seniority shall prevail.

(a) All newly hired employees shall be considered probationary for the first six (6) months of continuous employment, after which time seniority shall commence from the date of hire.

Article XI. Wages. Following is the minimum scale of wages:

Bracket No. 1

Wages

Receiving & Shipping Room

	Starting Wage	Wage After 6 Months Probationary Period
Clerks	\$1.30	\$1.50
Pricing Clerks	1.30	1.50
Counter Men	1.30	1.50
Order Clerks	1.30	1.50

Bracket No. 2

Wages

Checker	\$1.20	\$1.40
Packers	1.20	1.40
Delivery Men	1.20	1.40
Inventory Men	1.20	1.40
Warehouse Employees	1.20	1.40

(Testimony of Frank T. Baldwin.)

General Counsel's Exhibit No. 3—(Continued)

Extra men when called shall be paid a minimum of four (4) hours per call. No extra men shall be called until the permanent forty (40) hours crew has been established. Any time worked over four (4) hours continuously in the higher bracket, shall be paid the high bracket rate of pay for the hours worked. Work performed under this clause shall be reported by the employee to the foreman in charge of the employees in the unit.

Paydays shall be on the basis determined by the Company, but not more frequently than once per month.

Article XII. Grievances or Disputes. Any employee or group of employees, having grievances or disputes, shall present them in the following manner:

(1) Take up the grievance or dispute with the foreman within three (3) working days of date of its appearance.

(2) If not properly settled at that stage, the grievance or dispute shall be reduced to writing and shall be taken up between a representative of the Union and a representative of the Company.

(3) The Company shall give its answer to the written grievance or dispute in writing, within three (3) works days after its presentation.

(Testimony of Frank T. Baldwin.)

General Counsel's Exhibit No. 3—(Continued)

(4) If the Company's answer is unsatisfactory, a board of Arbitration shall be created. When and if an Arbitration Board is created, said Board shall consist of two (2) representatives of each party hereto. The Board of Arbitration shall give its decision within a time limit not to exceed seven (7) working days, not including Saturdays, Sundays, or legal holidays.

(5) The findings and decisions of the Arbitration Board shall be final and binding by both parties.

(6) In the event the four (4) members of said Board of Arbitration cannot agree, a fifth member will be selected by the Board. In case the four (4) members of the Board of Arbitration cannot agree upon a fifth member within seven (7) working days, then, and in that event, the United States Conciliation Service shall designate the fifth member.

(7) The expense of such fifth member of the Board shall be borne equally by both parties.

(8) The Board of Arbitration as hereunder set forth, shall not handle negotiations for a new agreement, or changes in the Wage Scales, Hours of Work, or Working Conditions, which are a part of this Agreement.

This Agreement is to continue and remain in full force and effect and to be binding upon the respective parties hereto from July 27, 1953, until July 27, 1954. Either party, desiring to change this

(Testimony of Frank T. Baldwin.)

General Counsel's Exhibit No. 3—(Continued)

Agreement, shall give notice to the other party of a desire to change, at least sixty (60) days prior to the date of expiration of this Agreement. Such notice shall include any proposed changes.

GENERAL TEAMSTERS, WAREHOUSEMEN,
AND HELPERS, LOCAL No. 483,

By /s/ F. T. BALDWIN,

Secretary-Treasurer,

Teamsters Local No. 483.

INTERMOUNTAIN EQUIP-
MENT COMPANY,

By /s/ PHILIP A. DUFFORD,

Vice Pres., Gen. Mgr.

Received in evidence September 28, 1954.

* * *

Q. By Mr. Weil): Have you in your capacity with the Union at any time since July 28, 1953, requested respondent to pay sick-leave to employees who were sick? A. Yes.

Q. At what time?

A. Well, I talked to Mr. Dufford on or about January 4.

Trial Examiner: This year?

The Witness: Yes, before we filed charges.

(Testimony of Frank T. Baldwin.)

Q. (By Mr. Weil): Where did you speak to Mr. Dufford?

A. I talked to him by telephone.

Q. Did you speak to him at any other time about the payment of sick-leave?

A. About sick-leave, no. I did about the bonuses.

Q. When you called Mr. Dufford, where did you call him or did he call you?

A. No. I called him from my office. I told him it was my [32] understanding that some of the boys will be denied the sick-leave, had been docked for the sick-leave, and was he going to pay them, and he said no. He still took the position that was the Company's prerogative, and that was the end of the conversation.

Trial Examiner: You say that was the end?

The Witness: Yes.

Q. (By Mr. Weil): Did you call to his attention any promises that you considered him to have made?

A. Not on sick-leave, no. On bonuses, we had——

Mr. Smith: Shouldn't the witness confine himself to the questions?

Trial Examiner: Yes. Wait until a question is asked. As I understood you, you said that that was all of the conversation that you had by telephone that day?

The Witness: Pertaining to sick-leave, that is all.

Trial Examiner: Was there more to the conversation?

(Testimony of Frank T. Baldwin.)

The Witness: Just general conversation. That was all on the sick-leave. [33]

* * *

Mr. Weil: * * * Now, that being the case, I believe at this time I may make the entire matter more clear and definite by asking permission to amend Paragraph IX of the complaint to read, to strike the word "some" and to read "On or by December 25, 1953, respondent paid bonuses to substantially all of its employees who are not members of the Union," et cetera. [37]

* * *

Mr. Weil: Yes.

Trial Examiner: In view of the fact that the basis of the complaint is a discrimination, I believe that it is permissible at this time to amend that complaint as moved. So I will grant the [38] motion.

* * *

Mr. Weil: Do I understand you to say that the respondent has paid the sick leave and bonus with which we are concerned in this case?

Mr. Smith: No, but——

Mr. Weil: Do I understand that respondent has paid any sick-leave or bonus as a result of the filing of this charge? [43]

Mr. Smith: No. [44]

* * *

Trial Examiner: On the record.

Because of my original misunderstanding as to

(Testimony of Frank T. Baldwin.)

the scope of General Counsel's motion to strike, I think it becomes necessary for me to revise my first ruling with reference to the paragraph starting on the bottom of Page 2 of the respondent's amendment to the answer, the so-called "wherefor" clause.

Now, I originally considered it immaterial and, for that reason, had decided not to strike it, but in view of the fact that it does go to the same material as in Paragraph V of the amendment to the answer, I feel that my original ruling requires an amendment. Inasmuch as the first clause of the "wherefore" paragraph is an indirect denial of the complaint, I will permit that to stand, but I will grant the motion to strike the balance of that paragraph. [47]

* * *

Direct Examination

(Continued)

By Mr. Weil:

Q. You testified that you first contacted the respondent on June 3, 1953, after the election. Is that your present belief, that that is the correct date?

A. No, July 3rd.

* * *

Trial Examiner: Ask him if he knows when the election certification was issued.

The Witness: It was on the 18th or the 26th of June. I contacted him on July 3rd rather than June, as I stated this morning. July 3rd was the first meeting I had with him.

Q. (By Mr. Nielson): Mr. Baldwin, how many

(Testimony of Frank T. Baldwin.)

meetings did you have with the Company with reference to this contract? A. In negotiations?

Q. Yes. [48]

A. Six, including the one that the contract was signed at.

Q. Going back to the first one, you state that on July 3rd you had your meeting. Who was present besides yourself? A. On July 3rd, no one.

Q. Who else was present?

A. Mr. Dufford.

Q. And yourself? A. Yes, sir.

Q. That is all? A. Yes.

Q. As I understand it, that was merely a preliminary meeting? A. That is right.

Q. What time or at what meeting, at what instance was your proposed contract delivered to the Company?

A. On the morning of July 22nd, I believe.

Q. Now, that was a meeting set up where?

A. At the Company's office on South Broadway.

Q. In Boise? A. In Boise.

Q. Now, I think you testified that there were other people there besides yourself. Who were they?

A. For the employees on the Union side was Speed Stewart, Roy Buntin, myself; and on the employer's side was Mr. Dufford, Ray Fortune.

Q. Now, Mr. Buntin and Mr. Stewart, they were present as a [49] negotiating committee for the Union? A. Yes, elected by the membership.

Q. And they were aiding you in negotiations?

A. Yes.

(Testimony of Frank T. Baldwin.)

Q. Now, Mr. Dufford, who is he?

A. He is the manager, I believe, of the Intermountain Equipment Company, president.

Q. And Mr. Fortune, who is he?

A. He was the labor relations manager for Morrison-Knudsen.

Q. Do you know in what capacity he was present?

A. I imagine to assist and help Mr. Dufford.

Trial Examiner. Don't imagine, please. Do you know?

The Witness: Well, he was assisting and helping Mr. Dufford.

Q. (By Mr. Nielson): Was there any conversation had with Mr. Dufford as to the status of Mr. Fortune?

A. Mr. Dufford asked me if I had any objections to Ray sitting in and helping him with negotiations, and I said no.

Trial Examiner: That is Ray Fortune?

The Witness: Yes.

Q. (By Mr. Nielson): And Mr. Fortune attended those meetings and was present in that capacity?

A. Yes. At the last meeting, I don't believe he was present.

Q. But he was present at the July 22nd meeting?
A. Yes. [50]

Q. In reference to your six meetings, are you classifying more than one meeting being held on one day?

(Testimony of Frank T. Baldwin.)

A. Yes, there was more than one held on one day.

Q. In other words, would you say, then, that there were two meetings held on the 22nd?

A. Yes.

Q. Was any discussion had in that first meeting on July 22nd, with reference to the bonus or sick leave?

A. Only that we had it included in our proposal.

Q. And that was a written proposal?

A. Yes.

Q. Given to the Company at that time?

A. Yes.

Q. And there was no further discussion on it at that time?

A. Not in that morning meeting, no.

Q. Was there any discussion on it in the afternoon meeting?

A. Yes, there was some discussion on it. Not too much, however. We were going through the contract paragraph by paragraph, trying to explain to Mr. Dufford why we were asking for these things and the interpretation of each paragraph.

Q. When did you have the next meeting?

A. It was along the 23rd.

Q. That would be the following day?

A. Yes.

Q. Who was present at that meeting? [51]

A. Myself, Speed Stewart, Roy Buntin, Mr. Dufford, and Ray Fortune.

Q. And where was that meeting held?

A. At the Company offices.

Q. In Boise? A. In Boise.

(Testimony of Frank T. Baldwin.)

Q. Approximately what time, if you recall?

A. I believe 10 o'clock, as near as I can remember.

Trial Examiner: 10 in the morning?

The Witness: Yes.

Q. (By Mr. Nielson): What discussion was had there with reference to sick leave and bonuses, if you recall?

A. Well, that morning the meeting got quite warm over bonuses and sick leave. The contract—in other words, we had agreed on portions of the contract, but bonuses, sick leave, union shop, and wages were as yet unsettled. And bonuses and sick leave was the discussion that morning.

Q. Did you have a further meeting with the Company? A. In the afternoon, yes.

Q. In the afternoon. And the subjects of bonuses and sick leave were discussed there? A. Yes.

Q. And the same people were present that afternoon? A. Same, yes.

Q. Did Mr. Fortune take part in the discussion of sick leave [52] and bonuses at that meeting?

A. Yes.

Q. And Mr. Dufford? A. Yes.

Q. Now, did you have a further meeting with the Company?

A. Yes, on the, on or about the 27th, as nearly as I can remember.

Q. What was discussed there?

A. Well, the issue then was the wages and union shop.

(Testimony of Frank T. Baldwin.)

Q. Now, I think in your prior testimony, you have testified that you agreed upon a union shop clause after a six months' period. Is that correct?

A. We were asking for 31 days, a union shop, including 31 days, and Mr. Dufford first asked for six months' union shop clause, and we compromised on 60 days' union shop, I believe. Anyway, we compromised in between there, 60 days.

Q. Then your former testimony would be incorrect, is that right?

A. I believe I said this morning that he wanted six months, and we wanted thirty days, but we compromised on ninety days.

Trial Examiner: Your testimony this morning was that at first, and then you settled on six months, so I left it hanging there.

The Witness: I meant to say sixty days. The Company wanted six months, and we wanted thirty-one days, and we compromised [53] and settled on sixty days.

Q. (By Mr. Nielson): I think you testified this morning, also, that you had one discussion with Mr. Dufford, the manager, subsequent to January 1 on sick leave. Is that correct?

A. January 4th, I believe it was. [54]

* * *

(Testimony of Frank T. Baldwin.)

Cross-Examination

By Mr. Smith:

Q. Mr. Baldwin, you testified, I believe, that you had had no contact with the respondent prior to the certification, and there was some amendment to your direct testimony. Would you repeat what contact you had with respondent prior to certification, if any? A. You mean before the election?

Q. Prior to certification, that is, after the election and—it could be before the election, yes—before the results of the election were certified.

A. Well, I think I talked to him, as I do all employers, previous to the election, to the certification. As a matter of fact, we had a hearing here in this building on the consent agreement, and I talked to him then. [55]

* * *

Q. I see. Now, your first meeting with respondent relative to entering into negotiations was on what date? A. Oh, July 3rd, I believe.

Q. July 3rd? A. Yes.

Q. Did you not testify on direct that you had some conversation with Mr. Dufford on or about June 27?

A. Well, that date was wrong. It was July. The election wasn't certified until——

Q. Well, Mr. Baldwin, if I heard the direct examination properly, at first you testified that you first contacted Mr. Dufford June 3, and then you

(Testimony of Frank T. Baldwin.)

changed that date to June 27, and now it is July 3. Which date do you refer to? [56]

A. It would be July 3rd.

Q. July 3? A. Yes.

Q. That was the first conversation you had with Mr. Dufford relative to negotiations?

A. That is right.

Mr. Weil: Counsel, I don't believe that he testified June 27th. He testified that the certification was issued about June 27th, and from that he deduced it was July 3rd.

Mr. Smith: I believe the record will disclose.

Trial Examiner: I believe it will. That is, the record will speak for itself.

Mr. Smith: Yes.

Trial Examiner: My recollection is the same as Mr. Weil's.

Q. (By Mr. Smith): The first time, Mr. Baldwin, that you met with respondent, with Intermountain Equipment Company, was what date? This was not talked to them, but met with them.

A. If any memory serves right, it was July 22nd.

Q. July 22nd? A. Yes.

Q. As I recall your direct testimony, it was at the Intermountain Equipment Company's offices?

A. Yes.

Q. And, as I recall, also, your two stewards, Mr. Speed Stewart—is that correct? [57] A. Yes.

Q. And Mr. Buntin, they were present there with you? A. Yes.

Q. Now, you testified that these gentlemen bar-

(Testimony of Frank T. Baldwin.)

gained with you? A. Yes.

Q. With the employer and its representatives, is that correct? A. Yes.

Q. Do Mr. Stewart and Mr. Buntin have independent authority to bargain on behalf of the unit?

A. No one, including myself, has that authority. It all has to go back to the unit and be settled with a vote.

Q. Can they sign a bargaining contract?

A. No.

Q. Who can sign a bargaining contract?

A. I can.

Q. You can? A. Yes.

Q. Can you negotiate a bargaining agreement without the Union?

A. No—did you say without approval of the Union?

Q. That is correct. A. No, I can't.

Q. Every proposal of the employer is carried by you to the Union membership?

A. That is right.

Q. Is put to a vote? [58]

A. That is right.

Q. This is the Union membership and not merely those people in the bargaining unit, is that correct?

A. Only the people in the bargaining unit. [59]

* * *

Q. (By Mr. Smith): You testified on direct examination that you understood that Ray Fortune was present at these negotiations to assist Mr. Dufford and advise him, is that correct?

(Testimony of Frank T. Baldwin.)

A. Yes. [62]

Q. You recognized, did you not, that Mr. Dufford was the bargaining authority for the Inter-mountain Equipment Company?

A. Well, I assumed he was. He never had told me that Fortune had no authority, however. He asked me if I had any objections to Mr. Fortune sitting in, helping and assisting him, and he said that he didn't know too much about Union contracts, and he wanted some help. And I said I most certainly welcomed Mr. Fortune because I had dealt with him for years.

* * *

Q. Yes. You say on July 22nd you met Mr. Dufford and at that time Mr. Dufford asked you if it would be all right if Mr. Fortune sat in, and, therefore, Mr. Fortune did sit in on that meeting. Those present at that meeting were yourself, Mr. Buntin, and Mr. Stewart for the Union and Mr. Fortune and Mr. Dufford for the respondent company, Inter-mountain Equipment Company. Is that [63] correct?

A. I also believe—I don't know who he was—some old gentleman came for a little while, and then he got up and left, and I believe that Mr. Dufford, Phil said—

Q. (Interrupting): Well, that is immaterial. And the issues discussed on July 22, 1953, in the morning—that was meeting Number One by your count of such meetings? A. Yes.

(Testimony of Frank T. Baldwin.)

Q. Was merely the processed contract, that is, the proposal of the Union, submitted?

A. Yes, it was discussing back and forth our proposal which we had presented to the Company.

Q. All right. In that proposal, would you mind restating what were the principal items that you asked for?

A. Well, there was an entire new agreement. We were asking, of course, for everything that was in the agreement.

Q. Well, the principal items?

A. Well, it would be wages, hours, working conditions, and the term of the agreement, and the bargaining unit recognized in the contract.

Q. And you testified also, I believe, that bonuses and sick leave were asked for?

A. That is right.

Q. And you requested originally sick leave for six days, I believe you testified?

A. I believe that is right. I believe six days is right to [64] the best of my knowledge.

Q. What was the amount of bonus you requested?

A. I believe the equivalent of one month's pay.

Q. Did Mr. Dufford or Mr. Fortune make any statement that morning as to the bonuses?

A. It was discussed some with Mr. Dufford taking the position that that was a Company prerogative. And it wasn't discussed too much at all in the first meeting. We were just getting generally an over-all picture of the proposal.

(Testimony of Frank T. Baldwin.)

Q. What mention was made of sick leave by Mr. Dufford for the Company?

A. The first meeting, now?

Q. Yes.

A. Just a general discussion. There was nothing, no discussion on any one paragraph of the contract. It was all discussed, and he was discussing sick leave and bonuses, that he thought that was up to the Company. Just a general discussion.

Q. At no time was there a refusal to bargain on the part of the Intermountain Equipment Company?

A. You mean during the first meeting?

Q. Yes. Any of the meetings.

A. No. They never refused to bargain, no.

Q. When was the first time that you had considerable discussion about bonuses and sick leave?

A. I believe it was the second meeting, meeting on the second, [65] on the second or the first meeting on the second day.

Q. That would be the third meeting, is that correct?

A. Yes.

Trial Examiner: 23rd, was it?

The Witness: If my memory is right, it was the morning of the 23rd, that meeting.

Q. (By Mr. Smith): And, I believe, you testified that these issues were warmly discussed?

A. They were, especially in the afternoon meeting.

Q. What do you mean by warmly?

A. Well, I could go into the discussion that we

(Testimony of Frank T. Baldwin.)

had this morning, my testimony this morning, with Fortune and myself—Mr. Dufford wasn't too involved in the thing, Mr. Dufford taking the stand——

Q. What do you mean by "warmly"? How do you define the word or use this word?

A. Well, where one side gets irritated, and the other side gets irritated, and you proceed to pound the table a little bit and——

Q. (Interrupting): There was heated discussion, in other words? A. That is it.

Q. And some animosity, perhaps?

A. Well, I wouldn't say animosity. It was just a heated discussion.

Q. It was conducted in a perfectly friendly spirit, was it? A. That is right. [66]

Q. In other words——

A. (Interrupting): I always do.

Q. In other words, the words flew thick and fast but in an aura of peace, is that right?

A. That is right.

Trial Examiner: A friendly fight?

Mr. Weil: Let's trade punches?

The Witness: Yes, that is right.

Q. (By Mr. Smith): Were these issues more warmly discussed than other issues?

A. They were until Mr. Dufford said that he would; if any of the rest of them were paid a bonus, our people would be paid a bonus. He would treat them all alike.

Q. At what meeting did Mr. Dufford make that statement?

(Testimony of Frank T. Baldwin.)

A. I think in the morning meeting, and, also, it was stated at the afternoon meeting.

Q. On what day? A. July 23rd.

Q. Both times Mr. Dufford made that statement?

A. In the first meeting in the morning when it got a little warm—or heated, as you say—he then said that it was Company policy, that in the past history they had paid all people bonuses and he did not intend to change it. If anybody was paid a bonus, then they would all be paid a bonus. In the afternoon meeting it was decidedly heated, and then this episode took place that I [67] testified about this morning, and then during a recess the two boys and I went across the hall, and I asked them if they believed this.

Q. The two boys you referred to are whom?

A. Speed Stewart and Roy Buntin.

Q. Mr. Fortune or Mr. Dufford wasn't with you?

A. No, we had left them at the conference table. And I asked the boys if they believe this. And I don't remember which one I——

Q. If they believed what?

A. That they would be paid the bonus. I was trying to get the bonus and sick leave in the contract. The Union's policy is to get the things in black and white, and then you have no argument over them. The Company's attitude was that they wouldn't put them in there, and they further stated that they had been paying them heretofore so, therefore, nobody would get hurt—words to that effect on the thing. And I was insisting that they go in

(Testimony of Frank T. Baldwin.)

the contract because the negotiating contract, unless you have got it in there, it's my belief that it's not good. So I asked these two boys if they believed what he had said this morning, Mr. Dufford. And I am not sure which one, to my memory—my memory would lead me to say it was Roy, who had been there the longest, said "He has always paid a bonus. You can believe him. So it's O.K." And I asked the other boy, I am sure it was Speed, now, he was the newest employee, and he said "I have only been [68] here a short while, but you can believe him." And so I came back to the sick leave, and nothing further was said about it.

Q. Nothing was said?

A. Just about union shop and wages.

Q. No word was said about it until after the 1st of the year?

A. You mean asking the Company about it?

Q. Right.

A. No, we had had meetings in between.

Q. You had had meetings on bonuses in between those periods of times, is that correct?

A. No. He was working, the employees were working 47 hours, and they went to 40 hours. Some employees would come in at Monday noon, and we had asked Mr. Dufford to change that, and he had agreed that he would look into it and change it. And we had, if my memory serves me right, two meetings, talking on changing this, and finally there was a definite stand that we would change it the 1st of the year.

(Testimony of Frank T. Baldwin.)

Q. Change what?

A. This going to work at Monday noon instead of Monday morning at 8 o'clock. And in these two meetings, whatever date they were, I don't remember now, we had asked him about the bonus. The two employees were with me, Stewart and Buntin.

Q. What did Mr. Mr. Dufford say about bonuses?

A. They took the same position, it was a Company prerogative, and if they wanted to pay them, they would. And he was rather [69] irked about it, why we were interested in it. If the Company wanted to pay it, they would pay it, and that would be it.

Q. After you had entered into the contract on July 27, is that correct?

A. I think the contract was signed the 28th.

Trial Examiner: That was the period of the contract, 27th of July, 1953, to '54? The signing date doesn't appear.

The Witness: It was on that date, sir.

Trial Examiner: It's dated on the 27th there in the first paragraph.

Mr. Smith: Well, one day.

A. (Continuing): To further answer your question, we discussed bonuses after the 1st of the year, meaning 1954.

Q. (By Mr. Smith): You discussed bonuses specifically then?

A. Yes. At one time I asked——

Q. You mentioned them in these two previous

(Testimony of Frank T. Baldwin.)

meetings, at which Mr. Dufford took his original stand? A. That is right.

Q. Is that correct? A. That is right.

Q. Could you specify, within a relatively short period of time, when these two meetings took place?

A. No, I can't because it was a meeting over a condition in the contract, and it was just an everyday occurrence that happens, the Union going down and talking to the employer about [70] straightening up some grievance. I can't tell you the dates on that.

Q. You had a grievance at that time?

A. It was over the hourly week, the fellows coming to work, changing first from 47 hours to 40, and then the fellows coming in Monday noon rather than coming in in the morning; just a general discussion of what the Union terms a grievance.

Q. I see.

Trial Examiner: Do you know if that was this year?

The Witness: They were in 1953. I think we talked to him once in 1954, and he changed the setup, I believe, in March if I remember right, if my memory serves me right. We had prevailed upon Mr. Dufford to change it in January, and he was a busy man, of course, out of town a lot. And I think that he did change it in March. If my information is correct, I believe he did.

Trial Examiner: As a result of a recent discussion or was that just a belated action?

The Witness: Well, no. We had been talking

(Testimony of Frank T. Baldwin.)

to him about getting him to change it in previous meetings, and in one meeting in January, I believe it was, he then assured us that he would change it as soon as he could. And he did change it in March; I believe March was the date.

Trial Examiner: I think that fixes the date fairly well, doesn't it, of the discussion?

Mr. Smith: Well, one discussion was probably in the fall and one in January, is that correct? [71]

Trial Examiner: One was in 1953. I haven't tried to fix it any more there.

The Witness: Two.

Q. (By Mr. Smith): And the next one was in the spring of 1954?

A. That is right. And we then, the one in January, we then discussed bonuses again, and I asked him about paying them, and he still took the same position. And I said to him, "Well, in our negotiations you had said that if you gave anybody a bonus, you would give them all a bonus." And he seemed to be concerned how we found out who got paid a bonus and who didn't get paid a bonus.

Q. Mr. Baldwin, I believe you testified previously that you didn't have authority to enter into a binding bargaining agreement without first presenting that management's proposal to the membership. Did you present the management's proposal?

A. Yes.

Q. Of bonus?

(Testimony of Frank T. Baldwin.)

A. Yes, we discussed that in our meetings.

Q. What did you say at the meetings?

Trial Examiner: Can we fix the date or is this supposed to be general?

Mr. Smith: Well, yes, prior to the signing of the agreement on July 28.

A. That would have been between July 23rd and July 27th. I can't tell you what night without going back to the Union office. [72]

Q. What did you say?

A. I told the employees, who were all present except two, I believe, or one, that Mr. Dufford had assured us if anybody was paid a bonus—bonus and sick leave was the issue—that he had assured us that if anybody was paid a bonus, meaning in his employment, that they would all be paid bonuses. And the two boys who were setting in on negotiations with me, Stewart and Buntin, also said the same thing to the employees. And they finally accepted it by a majority vote, and I signed it.

Q. You are positive that Mr. Dufford made this statement? A. What statement?

Q. The statement to which you previously testified to the effect that if any employees were paid a bonus, all employees would be paid a bonus.

A. Yes, I am positive.

Q. You are positive that—do you know which employees specifically Mr. Dufford was referring to in such a statement?

A. Well, all employees. He said if a bonus was paid to any employee, they would be paid to all em-

(Testimony of Frank T. Baldwin.)

ployees within our unit and all the rest of the employees outside of our unit.

Q. Did he say within your unit?

A. He said all employees. There would be no change.

Q. Was he referring to all employees of the Company or all employees in the unit?

A. Both, all employees of the Company and all employees in the [73] unit.

Q. You said that you took Mr. Buntin and Mr. Stewart aside and asked them if that is what they had heard, you weren't quite sure of what you had heard?

Mr. Weil: That isn't what he said.

Q. (By Mr. Smith): What did you say? What did you state?

A. I asked them "Do you believe this?"

Q. "Do you believe this?"

A. Yes. Mr. Dufford had said if any employees would be paid a bonus and sick leave, all employees would be paid. That was the general conversation. And I asked the two, Stewart and Buntin, do you believe this? We went out and had a caucus and, to repeat myself again, I am almost positive that Mr. Buntin who had been there for years said, "Whatever he says, you can believe him, so it's all right." And the younger one, who would be Mr. Stewart, said, "Well, I haven't been there very long, but I know you can believe him." And so we went back to the meeting.

Q. In other words, Mr. Baldwin, you didn't feel

(Testimony of Frank T. Baldwin.)

that the issues of bonus and of sick leave were important enough to be written into the contract?

A. Yes, I was insisting they be in there.

Q. Did you insist they be incorporated in the written contract after Mr. Dufford had allegedly made his oral promise?

A. I insisted until such time as the two employees who sat in negotiations with me said, "As far as we are concerned, it's all [74] right." And I still took the position that they should be in there. However, with the general meeting we had with the employees, they voted to leave it out, and I signed it, leaving it out of the contract.

* * *

Q. (By Mr. Smith): Outside of the issues of bonus and sick leave, were all other issues which were negotiated at this time incorporated in the written contract?

A. I believe so. As near as I can remember, they were. [75]

* * *

Q. (By Mr. Smith): What was to be the amount of bonus paid?

A. We were asking in our proposal which had been previously made, if my information was correct, one month. Sick leave, we were asking for six days, I believe.

Q. Did the employer, did Mr. Dufford or Mr. Fortune, did anyone acting for the employer ever make the statement that they would pay you one

(Testimony of Frank T. Baldwin.)

month's bonus? A. No.

Q. Or six days' sick leave? A. No.

Q. You had an agreement, a rather hazy, vague agreement, a promise on their part, which you understood to be a promise, that if they paid bonuses to anybody, they would pay bonuses to your people. What kind of a promise is that? That isn't a promise to pay a certain number of days' bonus.

A. I had their word, and in my business an employer's word means a lot to me. I had his word, Mr. Dufford's word, and I had [77] Mr. Fortune's word that they would not take it away from them. They would pay them the same bonus and the sick leave that had heretofore been paid. That is why I believed them.

* * *

Trial Examiner: Was there any reason why you didn't ask them to put the promise in writing that if they gave any bonus or sick leave they would give it to all?

The Witness: Well, we were trying to get that in our contract; in our proposal, we had that in there.

Trial Examiner: I know. Your proposal was for a definite bonus and a definite sick leave?

The Witness: That is right.

Trial Examiner: I am asking you whether or not you requested an indefinite assurance in the written contract that if any bonus or sick leave was given to any employee, it would be given to all?

(Testimony of Frank T. Baldwin.)

The Witness: No. We just took them for their word, at their word.

Q. (By Mr. Smith): Mr. Baldwin, if you took their word on that, how come you didn't take their word on all the other items which were included in the written contract? How come there is a written contract? [78]

A. There never will be any more words taken for granted, I will answer that way.

Trial Examiner: That is not responsive.

A. Strike that. Because that is what we finally arrived at and signed.

Q. (By Mr. Smith): Can you make a responsive answer to that question?

Mr. Weil: Let me object to the question as immaterial and irrelevant.

Trial Examiner: I think I will overrule that.

(The question was read as follows: "Q. Mr. Baldwin, if you took their word on that, how come you didn't take their word on all the other items which were included in the written contract? How come there is a written contract?")

A. The reason for a written contract is because that is what the employees agreed to and voted and authorized me to accept, and that was signed.

Q. And no other contract?

A. No other contract.

Trial Examiner: I made a statement awhile back in which I used the word "indefinite." I should

(Testimony of Frank T. Baldwin.)

have used the word "conditional." In other words, in my question to the witness as to whether or not he asked that the written contract include an indefinite promise, I should have said a "conditional promise," [79] that if a bonus or sick leave were given to one, it would be given to all.

You understood my question in that form, I take it?

The Witness: Yes, sir.

Q. (By Mr. Smith): I believe, Mr. Baldwin, you mentioned in your direct examination on the subject of sick leave that it has been your experience that only 65 per cent of the employees use sick leave. Is that correct?

A. I was using one Co-op Creamery as an example.

Q. How many employees?

A. I think he has around 70 or 80.

Q. And by that statement, you mean 65 per cent of the employees used all of their sick leave?

A. Yes.

Q. And the other 35 per cent, then would use——

A. None. [80]

* * *

(Testimony of Frank T. Baldwin.)

Redirect Examination

By Mr. Nielson:

Q. Mr. Baldwin, going back to this meeting, your testimony on this meeting wherein the oral contract was discussed, do you recall having any conversation with Mr. Fortune and Mr. Dufford in reference to the system that Intermountain Equipment Company had had prior to this time in reference to sick leave and bonuses?

Trial Examiner: Are you referring to all meetings or any specific one?

Mr. Nielson: All meetings. [81]

* * *

Mr. Smith: Can we hear the question restated?

(Question read.)

A. There was no discussion on the system if my memory serves me right. We were just asking that they be paid the same, on the same bonus system that they had been using and sick leave.

Q. (By Mr. Nielson): Was there any, did they tell you then what the prior system had been at Intermountain Equipment Company?

A. That employer, you mean?

Q. No.

Trial Examiner: Did you know?

The Witness: Through the employees, yes, sir. [83]

* * *

(Testimony of Frank T. Baldwin.)

Q. (By Mr. Nielson): * * * Was there any reason why there wasn't a written contract covering this oral contract on sick leave and bonus?

A. In the first place, the Company objected to putting it in the contract, and secondly, the employees had said, "Well, whatever he says, he will do, and that is all right," and that is the reason it wasn't put in there.

Trial Examiner: Just a minute. It seems to me that the witness must have misunderstood the question in order to answer it that way. In view of the witness' previous testimony that he did not request that the conditional promise be put in the contract, I think that his answer was intended to be, to refer to the objection of the respondent to the specific bonus of one month's pay and six days' sick leave rather than the conditional promise.

Now, I don't know whether your question was intended to go only to the conditional promise or not, Mr. Nielson.

Q. (By Mr. Nielson): Perhaps I am confused. There was no written clause put in the contract as requested by the Union, is that correct?

A. That is right.

Q. On this oral statement and promise made by the Company, that wasn't reduced to writing, is that correct? A. No.

Q. Is there any reason why it wasn't reduced to writing?

A. The Company objected to reducing it to writing. [84]

(Testimony of Frank T. Baldwin.)

Q. Was that the only reason?

A. The other reason being that the employees in this caucus said that whatever he tells you, you can believe him.

Trial Examiner: Mr. Baldwin, when I was questioning you awhile back, you said that you never asked the Company to put that specific promise in writing. Therefore, how could there be an objection?

The Witness: In our proposal, we had had it in our proposal to the Company, I mean the proposal we gave the Company, it was in there.

Trial Examiner: The proposal, however, was not that the Company pay bonuses to all employees if any got it?

The Witness: That is right. So we didn't put it in the contract that the Company objected to—wouldn't agree, as a matter of fact, to put it in the contract. And the only reason I personally agreed to it was because of the fact that the employees said it was all right, leaving it out of the contract.

Trial Examiner: Any further questions?

Q. (By Mr. Nielson): Was there any discussion had in reference to adding that specific clause or that specific type of an agreement to the written contract?

A. There was discussion in the regular meeting with the balance of the employees, yes.

Trial Examiner: Which particular phase?

Mr. Nielson: In reference to sick leave and bonus. [85]

(Testimony of Frank T. Baldwin.)

Trial Examiner: As originally proposed?

Mr. Nielson: No, as stated by the Company.

The Witness: It was discussed in the general meeting except it wasn't in the contract.

Q. (By Mr. Nielson): As a proposal by the Company?

A. Yes.

* * *

Recross-Examination

By Mr. Smith:

Q. What specific statement did Mr. Dufford make relative to sick leave?

A. He said that all employees would be treated alike. If he gave it to the employees, any of the employees, he would give it to all the employees.

Q. And Mr. Dufford never told you his policy toward sick leave? [86]

A. We may have discussed that some. I don't think to a great extent because I didn't know how much sick leave—we were asking for, specifically, six days' sick leave. I think it was discussed, I don't know which meeting, that they had different policies on that. We didn't go into that, no.

Q. Then it was your understanding that Mr. Dufford agreed to six days' sick leave?

A. No.

Q. What is the oral contract?

A. That he would not change it. Just the same as before the Union went in there, whatever sick leave they were getting before, the employees would still receive that. It would not be denied them.

(Testimony of Frank T. Baldwin.)

Trial Examiner: But they were not receiving any?

The Witness: Well, sir, my information was that they were.

Trial Examiner: That they had been in the past?

The Witness: Previous to the Union, yes.

* * *

Q. (By Mr. Smith): In your experience in dealing with a good many employers and in bargaining on behalf of the Union, has it been your experience, is it customary in your opinion for you or for others that oral agreements should be a part of agreements with employers or that you have side oral agreements with employers? [87]

A. Employers I deal with, their word is as good as a contract, many of them.

* * *

Trial Examiner: Where did you get your information as to the practice of the Company in regard to sick leave before the [88] Union was certified?

The Witness: In the Union meetings that we held before we were certified.

Trial Examiner: That is to say, employees told you what the practice had been?

The Witness: They told me approximately the past practices, yes, sir, that the bonus, they got one month's salary, I believe, and in sick leave, they were allowed two or three days or four days or a week or whatever time they were sick. I remember

(Testimony of Frank T. Baldwin.)

in one case one employee was allowed more than that.

Trial Examiner: Were they telling you what the practice was or what their personal experience had been?

The Witness: They were telling me what the past practice of the Company had been.

Trial Examiner: That is to say that all the employees in the unit had gotten one month's pay?

The Witness: I think that is right.

Trial Examiner: For how many years?

The Witness: I can't answer that. I think some had been there five years, some three years. I think if an employee had been there, I believe, less than a year—I am not positive on this—he didn't receive any bonus or he may have received a portion of a bonus; but after they are there a year, I think they all receive—at least I was told—an amount of pay equal to a month's pay, that amount of bonus. [89]

Trial Examiner: Was there any statement as to how long that had been in effect?

The Witness: I believe one employee said seven years.

Trial Examiner: Was that brought up in your meeting, or any of your meetings, with Mr. Dufford?

The Witness: The amount of time?

Trial Examiner: Yes, other than the past practice.

The Witness: No, other than we wanted the same as they had been getting.

(Testimony of Frank T. Baldwin.)

Trial Examiner: Did you verify with Mr. Dufford what the past practice had been?

The Witness: I don't think we discussed that thoroughly because sick leave, as I said, depended on one day or two days or three days or whatever it happened to be.

Trial Examiner: Let's just talk about bonus for a minute.

The Witness: I don't believe I did, no.

Trial Examiner: I believe you said that Mr. Dufford took the position that the bonus was the Company's prerogative?

The Witness: That is right.

Trial Examiner: Whether they would give it or not?

The Witness: That is right.

Trial Examiner: In any of your discussions with employees or otherwise, did you get any information as to what the practice of the Company had been with respect to giving bonuses or sick leave to employees not in the unit? [90]

The Witness: No, only hearsay is all, sir.

Trial Examiner: I am going to ask, and counsel may object if they wish to this question, but I would like to ask because I feel that the witness' understanding may have some bearing upon the question of a meeting of the minds.

What was your information or belief as to employees outside of the unit, that is, with respect to the respondent's practice of giving sick leaves or paying bonuses?

(Testimony of Frank T. Baldwin.)

The Witness: Well, if my information is correct, they were paid the bonus this last year.

Trial Examiner: No, I am talking about the practice. You have said that with respect to the employees in the unit that you talked to, they represented to you or gave you the idea that it had gone on for seven years, with respect to bonus. Now I am asking you, did you have any information or belief with respect to the practice of employees not in the unit?

The Witness: No. No.

Trial Examiner: You didn't know anything about what bonuses they may have gotten?

The Witness: No.

Trial Examiner: Would the same be true with respect to sick leave?

The Witness: Yes, sir.

Trial Examiner: Would it be correct to say that any discussions you had with Mr. Dufford concerning bonuses or sick [91] leave were confined to the employees in the unit?

The Witness: Yes.

* * *

(Testimony of Frank T. Baldwin.)

Redirect Examination

(Continued)

By Mr. Weil:

Q. Mr. Baldwin, during the negotiations, was there at any time a discussion in which Mr. Fortune and Mr. Dufford participated concerning the practice of the Company in the past in paying sick leave and bonuses?

A. They had said that they had paid them to all employees.

Q. Is that all? A. Except——

Q. Do you recall the statement that Mr. Dufford made, if any, or——

A. No, not necessarily. Mr. Dufford took the position that that was a Company prerogative and he couldn't, he wanted to know how the Union found out who was getting bonuses and so on and so forth, how we knew, how the Union knew that.

Q. My question was, was there a discussion during which Mr. Dufford told you what the past practice of the Company had been?

A. The amount of pay?

Q. Not the amount of pay.

A. No, that they had been paying bonuses.

Q. The practice they had? [92]

A. And that he would not change that system.

Q. Did he say they were paying bonuses to all or just to some?

A. I don't think I remember it word for word, but he said, "To the employees."

(Testimony of Frank T. Baldwin.)

Q. Do you recall whether there was any discussion and comparison of the system of paying bonuses in force at, or that had been used at Intermountain and that that had been used at M.K.?

A. Well, the discussion was that Mr. Fortune then said that the monthly employees got paid a bonus, but the hourly employees did not get paid a bonus. And I remember talking of bonus with some other employers we had had under contract. They were paying 5 per cent of the contract at the end of the year.

Q. But did he state on what basis they were paying?

A. No.

Trial Examiner: Did anybody say anything about the comparison of the two companies as to the basis for pay?

The Witness: No. They were just discussing it, Mr. Fortune being from M.K. and Mr. Dufford being from Intermountain. They were discussing their system of paying bonuses, and Mr. Dufford's system of paying bonuses. I didn't ask him because I knew what the employees had been getting as far as bonuses were concerned, which was equivalent of one month's pay.

Trial Examiner: This was just a side conversation, then, between Mr. Fortune and Mr. Dufford?

The Witness: Well, no. Mr. Fortune told myself and the [93] two employees how M.K. paid the thing.

(Testimony of Frank T. Baldwin.)

Recross-Examination
(Continued)

By Mr. Smith:

Q. As a matter of fact, Mr. Baldwin, in the negotiations, the statement to which you referred in the promise on the part of Mr. Dufford, was it substantially this statement: that he considered bonuses a management prerogative, and that he would continue in the future to treat bonuses as a management prerogative, and he wouldn't change that system?

A. I distinctly said that he would not change it, and he added that if any employees would be paid bonuses, all employees would be paid bonuses.

* * *

Mr. Weil: I would like to call Mr. Dufford under Rule 43(b), please.

PHILIP A. DUFFORD

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: Will you state your full name, please?

The Witness: Philip A. Dufford.

Trial Examiner: And your home address? [94]

The Witness: 1921 North Twenty-first Street, Boise, Idaho. [95]

* * *

(Testimony of Philip A. Dufford.)

Q. (By Mr. Weil): Mr. Dufford, by whom are you employed?

A. Intermountain Equipment Company.

Q. Are you an officer of the Company?

A. Yes.

Q. What office do you hold?

A. Vice-president and general manager.

Q. As general manager, what are your duties?

A. To direct the affairs of the Company.

Q. All the affairs of the Company?

A. I have a hand in all of them. [99]

* * *

Q. (By Mr. Weil): Where is your office, Mr. Dufford?

A. Our principal office or head office is Boise, Idaho.

Q. No, your own office. Is your office in your principal office in Boise? A. Yes.

Q. How long have you occupied your present position with the Company?

A. That one, it would take a little time to answer. I have been vice-president and a corporate officer for approximately 13 years. I have been general manager of the Company, I believe, since about 1944. I can check that record and give you an accurate answer, but I can't tell you exactly.

Q. That is a close enough approximation.

Prior to becoming general manager of the Company, did you have another managerial position with the Company?

(Testimony of Philip A. Dufford.)

A. Yes. I was general sales manager.

Q. As general manager of the Company, are you responsible for the Company's policies in matters of labor relations? A. Yes.

Q. Are you responsible both to administer those policies and to arrive at those policies?

A. A portion of my responsibility would be shared by our board of directors.

Q. As to arriving at the policy, I take it? Does the board [100] of directors also participate in administering them?

A. Primarily that is my responsibility.

Q. As the person primarily responsible for the administration or labor relations policies, do you know how many employees you have approximately at the present time?

A. Yes. I could count if you don't mind.

Q. Do you have a record or something like that here?

A. Approximately 57 at Boise. Please understand we are confining this to this location.

Q. With that question, yes. I assume your managerial capacity extends to other locations?

The Witness: For the purpose of this discussion, we are talking about Boise only, are we not?

Trial Examiner: That is right.

Mr. Weil: That is right.

A. The reason I am uncertain, we have some turnover of employees in our accounting department and our purchasing department and other departments, which makes that figure change from

(Testimony of Philip A. Dufford.)

time to time, depending on the work load and availability of employees. It has been as high as 90, and it has been as low as maybe 20 at one time, going back many years. At the present time, it would be somewhere between 55 and 65.

Q. (By Mr. Weil): Does that extend for the last year, since the Union organization started, that it would be between those figures? [101]

A. It could have been greater at the earlier part of that.

Q. There may have been some diminishment in that number since last year?

A. Yes, due to business conditions.

* * *

Q. (By Mr. Weil): During your term as general manager, has the Company given Christmas bonuses to any of its employees?

A. We have paid bonuses to some employees.

Q. In the year 1952, were Christmas bonuses paid to employees?

A. We paid bonuses to some employees for '52 work.

Q. On what basis did you select those employees who were paid bonuses that year?

A. Strictly upon the judgment of the management and our own ideas on the subject.

Q. Well, inasmuch as you represent management, I assume you were aware of the judgment of management. On what basis was the [102] judgments of management exercised?

* * *

(Testimony of Philip A. Dufford.)

Q. (By Mr. Weil): I don't believe anybody said that. However, I assume you are aware of what factors were considered? A. Certainly.

Q. And this is the question.

A. The attitude of the employees, length of service with the Company, their relation to productive effort, degree of their participation in the objectives of our Company, which is to try to sell goods at a profit, the dispatch of their duties as assigned to them and as directed by their supervisors. Possibly other factors which I believe would be of confidential nature, involving personalities. [103]

Q. Did the consideration of these factors cause you to grant or withhold a bonus or cause you to grant a smaller or larger bonus? A. Both.

* * *

Trial Examiner: The question and answer will stand. The witness wanted to hear the question again, I believe. Will you read it?

(Question read.)

Trial Examiner: Having heard the question asked again, do you want to reverse your answer? [104]

The Witness: Counsel is asking me specific questions about something that is not specific in the way that we handle our bonus plan.

Q. (By Mr. Weil): That is what I was going to ask you.

A. We operate under what might be termed a manager plan of bonuses whenever, when and if

(Testimony of Philip A. Dufford.)

they are paid. To try to make specific formula or system out of that is not possible for me.

Q. That was the question, whether a specific formula was applied that——

A. (Interrupting): I didn't hear the question that way.

Q. I will restate it, then. Was there a formula applied by which bonuses varied not only in that they were granted or not granted, but in the amount granted? A. No formula was applied.

Q. Was in 1952 a specific amount of bonus granted, based on the same considerations for each employee who received a bonus?

* * *

Trial Examiner: Let me see if I do.

Are you trying to ask, Mr. Weil, whether all employees who [105] got bonuses at that time got the same amount?

Mr. Weil: Not the same amount, but the amount varied according to the same standards. In other words, did they get, each of them, a month's basic pay or did some of them get eight months', did some of them get one dollar? That is what I am trying to bring out.

The Witness: There was no consistent pattern involved.

Q. (By Mr. Weil): As to the employees who are presently within the unit, did any of those employees receive a bonus in 1952?

A. I believe so.

(Testimony of Philip A. Dufford.)

Q. Did any of those employees who were employed in 1952 by the Company not receive a bonus?

A. That I don't know right now. I would have to consult my record on that.

Q. Do you have that record with you?

A. No, I don't.

Q. Are you able to tell me percentagewise how many, what the percentage of the, of your employees in 1952 received a bonus? A. No.

Q. Could you answer that question by consulting your records?

A. Certainly, if it's pertinent to this hearing. [106]

* * *

Q. (By Mr. Weil): Do you recall whether any of your regular employees who had been with you during the year 1952 failed to receive a bonus for that year?

Trial Examiner: By regular employees, you mean those——

Mr. Weil: Who had been there for the period of that year.

A. I cannot tell you until I look into it.

Q. Do you recall how many of your employees received a bonus in 1952, at the end of 1952?

A. No, sir.

Q. And I assume you don't recall how many employees you had at the end of 1952, is that correct?

A. That is correct. [107]

* * *

Mr. Weil: Yes, sir. After considerable discussion, counsel indicated that he would stipulate in the following terms——

Mr. Smith: May I see the stipulation before you read it?

Mr. Weil: Yes.

Mr. Smith: Very well.

Mr. Weil: During the past several years, substantially all the employees, as defined in the Act, including substantially all employees whose classifications are presently in the bargaining unit, were paid annual bonuses.

* * *

Trial Examiner: On the record. [112]

Did the other counsel state that they entered into that stipulation, Mr. Smith?

Mr. Smith: No, they haven't.

Mr. Nielson: We will so stipulate.

Trial Examiner: And Mr. Smith?

Mr. Smith: We so stipulate.

Trial Examiner: And of course Mr. Weil does, since he offered it?

Mr. Weil: Yes.

PHILIP A. DUFFORD

a witness called by and on behalf of the General Counsel, having been previously sworn, was examined and testified further as follows:

Direct Examination
(Continuing)

Trial Examiner: You are just continuing the examination you began yesterday when you called Mr. Dufford under Rule 43(b) ?

Mr. Weil: Under Rule 43(b), yes, sir.

By Mr. Weil:

Q. What is the company's practice on the payment of sick leave to its employees in the unit at the present time ?

A. We, at the present time, have a clause in our 1954 contract which specifies that we will keep a record of sick leave and will pay sick leave up to six days per year.

Q. What was the company's practice during the year July 27, 1953, to July 27, 1954, concerning payment of sick leave to employees [113] in the unit ?

A. We had no sick leave clause in our contract and therefore we had no record which would indicate payment for absences.

Q. Was sick leave paid to any of the employees in the unit during that time ? A. No.

Q. Prior to July 27, 1953, what was the practice of the company as to payment of sick leave to employees who later became those employees in the unit ?

(Testimony of Philip A. Dufford.)

A. We had no policy or practice governing that particular thing.

Q. When an employee was sick, was he paid sick leave?

A. Not as such. That could vary. There was no set policy in that regard.

Q. Were any employees docked for time they lost because of sickness prior to that time?

A. I suppose they were. I don't believe that we had any—well, we had no way of determining that. In fact, we had no record which would disclose whether a person was absent because he was sick or for some other reason.

Q. An employee who informed his supervisor that he was sick and took off, thereby informing the company that he was ill, would that employee have been paid sick leave?

A. In our operation that was pretty much up to to the supervisor.

Q. Were there any ground rules under which supervisors made [114] decisions as to whether sick leave was to be paid or not?

A. Not that I know of.

Q. It was strictly a matter of the supervisor's own feelings on the matter?

A. Generally speaking, yes. It was possible he might consult with someone in the management group, I mean if there was protracted absenteeism involved.

Q. What led you to deny sick leave to your employees in the unit after the signing of the contract?

(Testimony of Philip A. Dufford.)

A. There was no sick leave provision in the contract.

Q. Were the rules of the company changed in any respect as to the employees in the unit, as to sick leave? A. I——

Trial Examiner (Interrupting): Will you read that question again, please?

(Question read.)

Q. (By Mr. Weil): Perhaps I should add, after the signing of the contract in 1953?

A. Well, I don't see how we could change any rules when we had no set rules.

Q. It is true, is it not, that after the signing of the contract no employees in the unit were paid sick leave? Isn't that so?

A. It wasn't covered by the contract.

Q. That isn't the question. [115]

The Witness: Will you read the question?

(Question read.)

A. Yes.

Q. (By Mr. Weil): It is true that prior to the signing of the contract employees at least may have been paid sick leave, is that not so? A. No.

Q. Are you saying that prior to the signing of that contract no employee was paid for sick leave?

A. I am saying that we had no policy in that regard and that if a person were paid for a time when he was absent, I don't have the slightest idea whether it was for sick leave or not.

(Testimony of Philip A. Dufford.)

Q. So persons may have been paid sick leave?

A. They may have been paid while they were absent from duty.

Q. So that there was a change in the company practice, then, after the signing of the contract?

A. No. After the signing of the contract we adhered strictly to the terms of the contract with respect to those members of the bargaining unit.

Trial Examiner: May I ask a question?

You said that previously it had been left pretty much up to the supervisor as to what to do if an employee had reported in that he was ill and was absent because of that. Now, were the supervisors given any instructions that they no longer had the authority to grant pay during absences, after the signing [116] of the contract?

The Witness: The instructions given to the supervisors in the unit were that they should at all times follow the letter of the contract.

Trial Examiner: Of course, the contract didn't say that sick leave should not be paid?

The Witness: It didn't have any clause regarding sick leave whatsoever.

Trial Examiner: Did you tell the supervisors that they should do nothing except what was in the contract?

The Witness: Right.

Trial Examiner: I am through. Thank you.

Q. (By Mr. Weil): Mr. Dufford, was the basis upon which the employees who are presently in the

(Testimony of Philip A. Dufford.)

unit were paid prior to the election the same as that by which they are paid now, after the election?

Trial Examiner: Do you understand the question?

The Witness: No, I don't understand what is meant by that.

Mr. Weil: I will break it down into two questions.

Q. (By Mr. Weil): Are the employees in the unit now paid on an hourly basis? A. Yes.

Q. How were they paid prior to the election?

A. Most of them, if not all, were paid on an hourly basis prior to the election. You are talking about the members in the [117] unit?

Q. Yes. A. Employees, I mean.

Q. Most of them were paid on an hourly basis. Did they have time clocks prior to the election?

A. We did not have time clocks prior to the election.

Q. Did you install time clocks any time since?

A. We did install a time clock after the election.

Q. For whom?

A. For the protection, the benefit of the members of the unit and management, to be certain, and that we had to maintain an accurate record, which was not deemed necessary before.

Q. Most individuals in the unit were hourly-paid, you say, before the election?

A. Yes, sir.

Q. Was it more necessary to install a time clock for their protection after the election than before?

(Testimony of Philip A. Dufford.)

A. Yes.

Q. In what respect?

A. In that we were not bound by the terms of a union contract which prescribed hours and time of employment and made it necessary for us to have such a record. We were satisfied with our own loose-knit way of doing business prior to that.

Trial Examiner: Was there any provision for time and a half before the election? [118]

The Witness: We paid time and a half.

Q. (By Mr. Weil): How long after the election were the time clocks installed?

A. I can't tell you the exact day. As soon after the election as we could install it. [119]

* * *

Q. (By Mr. Weil): You instructed all of the employees to punch the time clock? A. No.

Q. The time clock was only for the employees in the unit, then, is that correct? A. Correct.

Q. When employees are sick, they fall sick during working hours, or are required to meet a doctor's appointment or something like that, are they instructed to punch the time clock, punch out on the time clock?

A. They are instructed to punch out on the time clock whenever they leave, for any cause.

Q. And when they return, they punch in again. I assume?

A. That is right. A time clock operates, our time clock operates the same as any other time

(Testimony of Philip A. Dufford.)

clock in any other industry, as far as I know. Time clocks are time clocks.

Q. So that there is a record on the time clock of every absence, whatever the purpose of that absence, is that correct?

A. There should be. I assume that there is.

Q. There is if the employees have followed your instructions, the instructions they received?

A. Yes.

Q. Is there any notation made on the time cards as to their reasons for absences, when persons punch out? [120]

A. To the best of my knowledge, there wasn't prior to the inclusion of a sick leave clause in our 1954 contract.

Q. What is the company's policy toward absenteeism?

A. We have no set policy regarding absenteeism.

Q. Does the company take cognizance of absenteeism among its employees in the unit?

A. We do at present, since we have a sick leave clause incorporated in our 1954-55 contract.

Q. Did the company take cognizance of absenteeism prior to the signing of the '54 contract?

A. For that period are you indicating, the '53-'54 contract?

Q. That is right.

A. Only in that the records would disclose the amount of time off for any reason.

Q. Was any disciplinary action taken against any employee for excess absenteeism during that

(Testimony of Philip A. Dufford.)

year? A. Not that I know of.

Q. Were any employees absent for an excessive amount of time, to your knowledge, during the '53-'54 contract? A. Not to my knowledge.

* * *

Q. (By Mr. Nielson): Perhaps for purposes of clarity, talking [121] about the certified unit and other units in your plant, would you describe your plant layout and your divisions of employees or work processes, for claritive purposes?

* * *

A. We are a distributor of construction equipment. Our business is a variable one. We are not in what you might call a commodity business. We are in the sale of specialized equipment used by the construction, logging, mining and industrial trade. As to our organizational setup, we have an administrative or executive group and then the rest of our operation is, well, it would probably be called departmentalized——

Q. (By Mr. Nielson): Would you name the departments?

A. Yes. We have a purchasing department—one thing I would like to add here is that in our organization it is entirely possible, with all the departments I am speaking of, to have [122] functions overlapping, because we——

Q. (Interrupting): That is true in any of them——

(Testimony of Philip A. Dufford.)

A. (Interrupting): We are a small organization.

Q. I was just trying to get a definition.

A. Excuse me.

Q. I was just trying to get an over-all picture.

A. We have a purchasing department, an accounting department, a parts department—which, generally speaking, is the department within which this unit exists—a shop, a punch department, and a sales department.

The Witness: That is as well as I can explain it, Mr. Hemingway.

Mr. Nielson: That is sufficient.

Q. (By Mr. Nielson): Now, of all these units we have been talking about here, the only people, employees of the company, who are the members of the Union are the parts department, is that right?

A. They are the only ones who have petitioned for a Union.

Q. They are the only ones who belong to a Union?

A. The only ones for whom a Union has representation, exists, are employees in the parts department, up until that time.

Q. You have testified in reference to your records, lack of records, prior to the election in 1953 on sick leave. Now, how did you keep your time cards for your employees prior to that time? Who made them up, in other words? [123]

A. That is a detail that was handled by the supervisor of the department. We used a time-card

(Testimony of Philip A. Dufford.)

system, just filling it out at the end of the day. I would have to consult with the supervisor to find exactly—that is a detail that I didn't consider anything that I had to familiarize myself with a hundred per cent. I can't tell you exactly.

Q. Do you know whether or not the individual employee filled out the time card or whether the supervisor did?

A. I don't know that. I am sorry. I can find out very readily. In fact, if you wish, we could ask one of the boys here.

Q. Let me ask you this. At the end of the week, or payroll period, then those time cards were the basis on which the employees were paid, were they not?

A. So far as I know, yes. I didn't make out the payrolls or anything of the kind, because that is the function of some other department, and I have not familiarized myself with all those details.

Q. Now, in the other department, other than the parts department, the unit here involved, do you know how they make out their payroll, time cards, at the present time?

A. Those people generally are paid on a monthly salary basis.

Q. All of them other than these people in the unit are on a monthly salary?

A. That is right.

Q. Now, prior to the time of the election, were not all the [124] people paid on a monthly-salary basis once a month rather than on an hourly basis?

(Testimony of Philip A. Dufford.)

A. The members of our parts department, because of the nature of the work, were paid on an hourly basis.

Q. And they are the only people in your entire operation that are paid on an hourly basis?

A. Well, there is only one qualification I would like to make in that, that is regarding our shop and service employees, who operate under the Belo Plan, with which I am sure you are familiar.

Q. How about the people in the punch department? Are they hourly or monthly?

A. To the best of my knowledge, they are monthly. Some of the details on these things, Mr. Nielson, are things, I am sorry to say, I undoubtedly sound a little dumb to you, but I have not gone into the details except in a general way of knowing, we have the employees in those departments, but I don't make out the payroll and I don't handle all that detail.

Q. Well, the reason for my questioning was this, I am trying to find out if there was any comparison or any records that would be available for comparison to ascertain whether sick leave had been paid or not—so as far as you know, according to the way the time cards are made out, you would have no knowledge as to whether or not sick leave was paid on any sort of a basis? That was entirely up to the supervisor? [125]

A. Yes. Our records would not disclose that information.

(Testimony of Philip A. Dufford.)

Q. It would be strictly up to the supervisors, then?

A. It would, unless it were called to the attention of management in some way.

Q. But as far as you know, it hasn't been called to your attention? A. No.

Q. Following the election, you installed the time clock for these employees only? A. Yes.

* * *

Q. (By Mr. Nielson): Then, for the other people not members of the unit, their supervisor keeps their own time cards?

A. The head of each department is assumed by us to be in nominal charge of the people under his direction.

Q. I see. Now, following the election and certification of the unit, you gave specific instructions to the supervisors in that unit to follow the wording in that contract exclusively, is that correct?

A. Yes, sir.

Q. Now, at the present time are the time-clock cards in the custody of the supervisor of the department? [126]

A. Well, I believe they are.

Q. And then they are turned in to the payroll department?

A. Turned over to the payroll department for transferral of payroll records.

Trial Examiner: There is just one supervisor of

(Testimony of Philip A. Dufford.)

the department? I suppose that means the head of the department?

The Witness: Yes.

Trial Examiner: What is the title of the head of the department?

The Witness: Well, as far as he is concerned, he maintains the same designated before, we maintain the same designation for him, we call him the manager of our parts department.

Trial Examiner: All right.

Q. (By Mr. Nielson): Now, the managers of the various departments and the supervisors of the various departments, do they have to O.K. the payroll check or have anything to do with the amount of time that employees are paid upon?

A. In what way do you mean that, Mr. Nielson? As applying to all employees?

Q. Applying to all employees, yes.

A. Why, I suppose there is an understood approval of it, at least they would be paid at the rate set up for them unless their supervisor wished to change it in any way. Ordinarily there would be no necessity for change probably.

Q. Now, I think you testified that you had no set practice on [127] sick leave prior to '53, is that correct?

A. Yes, sir.

Q. In other words, there was no set standard by the company as to what would be allowed and what would not be allowed, is that right?

A. That is right.

Q. But had it been the practice to allow people

(Testimony of Philip A. Dufford.)

to be off sick and still draw their pay for that time off, to your knowledge?

A. It was not set up that way by any company policy. We——

Q. (Interrupting): Well, was it done, to your knowledge?

A. We may have done it in some cases, I am sure we have.

Mr. Nielson: That is all I have.

Trial Examiner: Do you want to ask any questions at this time, Mr. Smith?

Mr. Smith: Yes, I believe so. I would like to ask as to a few points.

Cross-Examination

By Mr. Smith:

Q. You testified now that you had no set policy as to sick leave prior to 1953?

Trial Examiner: It was '54, wasn't it?

Mr. Smith: Well, the question was as to '53.

Trial Examiner: Oh, I see. The first contract, you mean.

Q. (By Mr. Smith): Or, as a matter of fact, prior to 1954, isn't that correct?

A. Yes. [128]

Q. You do have a sick leave policy as to the employees in the bargaining unit since the 1954-55 contract has been negotiated, is that right?

A. It's contained in the 1954-55 contract, the provision for sick leave.

(Testimony of Philip A. Dufford.)

Q. Under that provision, you are obligated to pay how many days sick leave?

A. Up to six days.

Q. Up to six days.

A. And I would like to ask you to consult the contract for the exact wording of that. There are so many days in one month, a total of six days a year. I could ask someone to read that clause of the contract.

Trial Examiner: It's in evidence already.

Mr. Weil: That contract is not, sir.

Mr. Smith: I wanted Mr. Dufford's answer at this time. We will get to that later.

Q. (By Mr. Smith): Just in clarification of several points, are you obligated to pay any other employees, that is, employees other than those in the bargaining unit, sick leave at this time?

A. We are not obligated in any way to pay them sick leave, other than those in the unit, wherein the clause stipulates that we must pay them sick leave. No one outside the unit has any such assurance.

Q. And outside the unit, I believe you testified that all [129] other employees are paid on, or substantially all other employees, outside the unit, are paid on a wage or salary basis, is that correct?

A. Right.

Q. And no time cards are kept on those people?

A. Right.

Q. And never have been? A. Right.

Q. As to the unit in question, then, no sick leave provisions applied to the people who are pres-

(Testimony of Philip A. Dufford.)

ently in this unit until the 1954-55 contract was negotiated, at which time you became obligated to pay up to six days sick leave time, is that correct?

A. Right. [130]

* * *

Trial Examiner: Was there any particular reason why you sought the assistance of Mr. Fortune?

The Witness: Yes.

Trial Examiner: What was that?

The Witness: I felt that I was completely green and [131] ungrounded in matters of Union practice, and Mr. Fortune's business was the handling of labor-management problems, and I felt that he would know more about it, certainly, than I did, and I sought his advice in an effort to acquaint myself with a subject unknown to me.

Trial Examiner: Was there any connection between you and, or your company, Morrison-Knudsen, other than that of distributor and customer?

The Witness: I don't know if that has a bearing on this case.

Mr. Smith: I question the materiality of it, although I recognize the right of the Examiner to ask leading questions or to draw a conclusion where a conclusion might be drawn. Certainly there has been no allegation that Intermountain Equipment Company and Morrison-Knudsen Company have any relationship and I don't know whether it's material or not, and I don't believe it should be in the record. I might say, by way of explanation, Mr. Fortune's services were utilized by a good number

(Testimony of Philip A. Dufford.)

of firms, some of which had connection with Morrison-Knudsen, others which did not have connection with Morrison-Knudsen.

Trial Examiner: I was just wondering whether or not—well, I will sustain the objection to the question I asked, but I am going to ask another one.

Was it at Mr. Fortune's suggestion or yours that he was present at the first negotiating [132] meeting?

The Witness: It was at my suggestion. May I add something?

Trial Examiner: Go ahead.

The Witness: My chief reasons for consulting with Mr. Fortune were the reasons I gave you, and my reason for selecting him rather than some other person in the management-labor field, the fact that I happen to know him, the fact that he was more readily available for consultation than anyone else, it would be more natural for me to consult him.

Trial Examiner: In connection with the testimony you gave to Mr. Weil, on examination by Mr. Weil, in connection with the installation of the time clock, I think you said you put it in as soon as possible after the election—just to make it perfectly clear on that, do you mean even before the certification?

The Witness: I don't mean that. I mean as soon after the certification as possible. My terminology may not fit, so you will have to call my attention to that when it's necessary.

(Testimony of Philip A. Dufford.)

Trial Examiner: See if I understood you correctly—you said that the reason for installing the time clock was because of the fact that you anticipated that you would be held to a stricter accounting, was that it?

The Witness: Yes. And I also said that the installation of the time clock was for the benefit of the members of the unit as well as for management, and it gave us a record on which we might be able to stand, and I hoped that it would avoid any possible disputes over hours. [133]

* * *

Trial Examiner: Before the certification of the Union was your practice the same with respect to the matter of keeping time and other personnel practices, as between the various departments?

(No response.)

Trial Examiner: That is, did you have the same system of timekeeping in each department?

The Witness: No, I couldn't say that. The nature of the work has a great deal to do——

Trial Examiner: Well, you did mention that you used the Belo System for the shop, I believe?

The Witness: Yes.

Trial Examiner: So presumably the method of keeping track of earnings there would be a little different from the instances [134] where it was kept on a time basis?

The Witness: Well, yes, it would vary. And the

(Testimony of Philip A. Dufford.)

very nature, as I say, of the work. Salesmen, for instance, who come and go, they don't make so much money sitting around there, so they have to go out. We don't have control of their time——

Trial Examiner: Was it your testimony that the parts department was the only department where compensation was computed on an hourly basis?

The Witness: That would be generally true, Mr. Hemingway. We have some cases where we would have temporary help of some kind which might be engaged on an hourly basis. We had no specific rule, but the functions of the parts department lent themselves to an hourly computation more readily than the other departments.

Trial Examiner: With respect to the other departments, were the supervisors in those departments given any instructions with respect to discontinuing past practices after the Union certification?

The Witness: Not that I know of.

Trial Examiner: How many supervisors would there be in the parts department normally?

The Witness: I believe at the present time that there are three in the supervisory group.

Trial Examiner: Would each one of those have been in a position to have decided, prior to the Union certification, that [135] an employee might receive compensation, even though he was absent? Or was that a decision that was to be made by one particular supervisor?

(Testimony of Philip A. Dufford.)

The Witness: Well, that would be the responsibility of the manager of the department.

Trial Examiner: What is his name?

The Witness: Jess Kight. [136]

* * *

Redirect Examination

By Mr. Nielson:

Q. You testified in reference to a Mr. Fortune being present at the negotiations. Do you know what, specifically, Mr. Fortune's title was with Morrison-Knudsen?

Mr. Smith: I object to that.

Trial Examiner: That is all right for purposes of identification.

A. I don't know his specific title.

Q. (By Mr. Nielson): But you do know that he——

A. (Interrupting): I know that he was engaged in labor relations work.

Q. For the company?

A. For Morrison-Knudsen Company, yes.

Q. Did you ask Mr. Fortune to come into each negotiating [146] meeting as your representative?

A. To which meeting?

Q. To the meeting that you spoke of, at which he was present?

A. Yes, I believe I requested that he attend the meeting.

(Testimony of Philip A. Dufford.)

Q. Did he take part in those meetings, negotiations?

A. He spoke on occasion. He and Mr. Baldwin apparently have known each other for many years and they had many exchanges of conversation.

* * *

Q. Did you rely upon Mr. Fortune and his advice generally in those negotiations?

A. To some extent.

Q. But he was there as your aid and assistant in the negotiations?

A. Better, as an advisor or a consultant. [147]

* * *

ROY F. BUNTIN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: Will you give your full name, please?

The Witness: Roy F. Buntin.

Trial Examiner: And your home address? [148]

The Witness: 4219 Bethel Street, Boise, Idaho.

By Mr. Weil:

Q. By whom are you employed, Mr. Buntin?

A. Intermountain Equipment Company, at Boise.

Q. Where, in what location are you employed?

A. Broadway at Myrtle.

(Testimony of Roy F. Buntin.)

Q. In Boise? A. In Boise.

Q. When were you hired by the company, when did you go to work for them?

A. As nearly as I can recall, it was August 17th, 1948.

Q. In what capacity are you employed?

A. Counterman—was I employed at that time or now?

Q. Yes—I will change that—were you employed at that time.

A. At that time I was employed in the shipping section of the parts department.

Q. Are you still employed in that section?

A. No. I am now a counterman or parts man.

Q. Have you worked for the company regularly since your employ in 1948?

A. Yes, I have.

Q. Have you received bonuses from the company during your employ?

A. I received bonuses from the company, I believe there were four up until 1952.

Trial Examiner: Including or excluding [149] 1952?

The Witness: Including '52?

Q. (By Mr. Weil): How much bonus did you receive in terms of your annual salary? [150]

* * *

A. My bonus approximated one month's basic salary.

Q. (By Mr. Weil): Each year?

(Testimony of Roy F. Buntin.)

A. Each year, except that I might say, the first year, as near as I recall, it must have been, had something to do, the half year that I was there, from August on, I didn't receive as much bonus that year as I did in the following years.

Q. Did you receive a bonus in 1953?

A. No, I did not receive a bonus in 1953.

Q. Prior to the execution of the contract with the Union, with which you are familiar, according to the testimony, were you ever sick? Did you ever lose any time because you were sick while in the employ of the company?

A. I did lose some time from being sick. It would be hard for me to name the exact dates.

Q. Was your pay ever docked because of the time you lost from being sick?

A. I am quite sure that I was never docked during that time for any time that I was off sick.

Q. Since the execution of the contract on July 27, 1953, have you had occasion during which you were off sick?

A. I was off a half a day since that time, during the 1953 contract.

Q. Can you recall when you lost that half day?

A. As near as I recall, it was on or about February 17th.

Q. Were you paid for that day? [151]

Trial Examiner: February 17th of this year?

The Witness: Of 1954, right.

A. Yes—let me—we were still under the '53-

(Testimony of Roy F. Buntin.)

'54 contract, the first Union contract, as I understand it, was during that period.

Q. (By Mr. Weil): Were you paid for that day?

A. No, I was not, for that half day I was not paid.

Q. Did you attend any negotiating meetings between your employer and the Union?

A. Would that be in 1953?

Q. At any time.

A. At any time? Yes, I did.

Q. Did you attend any of the meetings which led to the signing of the contract on July 27, 1953?

A. Yes, I did.

Q. Did you attend all of those meetings?

A. I believe I attended at least four of those meetings, possibly five.

Q. In what capacity did you attend those meetings?

A. As I understand the question, the employees of the company who were in the Union voted to have two representatives sit in on the Union negotiations. Speed Stewart and I were elected as representatives to sit in on that, those negotiations. Maybe representative isn't the proper word, but we were elected to sit in on the hearings, the negotiation hearings. [152]

Q. At those negotiation hearings, or meetings, did you take any part in the negotiations?

A. We might have taken some small part in the discussion.

(Testimony of Roy F. Buntin.)

Q. Generally speaking, who carried the ball for the Union at these meetings?

A. Mr. F. T. Baldwin carried the ball.

Q. That is the same Mr. Baldwin who testified in your presence yesterday?

A. That is the Mr. Baldwin, yes.

Q. Would you tell me, as nearly as you can recall, what took place at these negotiation meetings—first, as to the first meeting that you attended?

A. Would it be necessary to state who was there, what, where the meeting was held?

Q. Yes, state who was there and where the meeting took place.

A. The meeting was held at Intermountain Equipment Company in Boise and those present were Mr. Dufford, Ray Fortune, Mr. Baldwin, and Speed Stewart and myself.

Q. Can you tell me when those meetings took place, when that first meeting took place, the approximate date?

A. I believe it was July 22nd.

Q. Will you tell me, if you recall, what took place, what you recall as taking place at that meeting?

A. As I remember, at that meeting we started off by reading the Union's proposal to the company, making sure that they [153] understood our proposal. There might have been some discussion, but mostly it was just the reading of the proposal at the first meeting.

Q. Were you present at another meeting follow-

(Testimony of Roy F. Buntin.)

ing that? A. Yes, I was.

Q. When?

A. I believe it was the same afternoon.

Q. Were the same persons present?

A. The same persons were present.

Q. What do you recall took place in that meeting?

A. As I recall, we finished reading the proposal during that meeting and there was, we went into discussion on the first items on the contract. As I remember, by the end of that meeting we hadn't agreed on the Union shop or wages or bonus or sick leave. As I remember, the Union shop was discussed rather thoroughly in the second meeting. Mr. Dufford couldn't understand why the employees of the company would want the Union shop. He could see Baldwin's reasons for wanting the Union shop. And I believe at that time that I spoke up and said that we felt that there could be a gradual hiring and firing of employees in the unit over a period of time and soon there would be no Union membership left. However, that was not agreed to in the second meeting, as I remember.

Q. When did you next attend a meeting?

A. Within the next day or two. I couldn't say exactly when [154] the third meeting was, what the date was.

Q. Who was present at this third meeting?

A. The same as the two previous meetings.

Q. Where did it take place?

(Testimony of Roy F. Buntin.)

A. At Intermountain Equipment Company, Boise, Idaho.

Q. Will you tell us what you recall took place at that meeting?

A. As near as I can remember, during the third meeting we got onto wages, sick leave and bonuses. I think probably wages were discussed first. I don't remember what prices were, what wages were arrived at. And I believe sick leave came up next.

Trial Examiner: Do you mean that you settled the wage question?

The Witness: No, I don't mean it was settled. It was discussed. I think probably there was another proposal on wages after this time. It was discussed. Sick leave was also discussed. As I remember, Mr. Dufford took the position that if he paid, if the company paid sick leave to the employees, if it was written in a contract, the employees would feel they were entitled to the sick leave and would take it.

Trial Examiner: You mean whether or not they were sick?

The Witness: Whether or not they were sick, they would feel entitled to it and take it. And I remember Baldwin being in on the discussion. He cited several cases where he knew of companies where sick leave hadn't been taken, at least 100 per [155] cent. Let's see now. As I remember, I don't believe Fortune got into the sick leave discussion, as far as I remember. I believe Baldwin then said that if sick leave was left as it had been previously, understanding that it would be paid if a

(Testimony of Roy F. Buntin.)

person was sick, that he would consider it discrimination, he made a statement there that he would consider it discrimination and would file charges if it would not be paid as it had been in the past.

Trial Examiner: Will you read the full answer, please?

The Witness: Maybe I wandered around a little.

(Answer read.)

Trial Examiner: That is inconsistent there. The first of it needs correcting. Maybe he dropped an "in the" there.

The Witness: I didn't catch that first part. On the last part, it was definitely, Mr. Baldwin definitely brought out that in relation to the other employees, if sick leave wasn't paid, the same to us as it was in relation to the other employees, that he would consider it discriminatory. Does that clear that up now?

Trial Examiner: Yes.

Go ahead. Ask your next question.

Q. (By Mr. Weil): Was there any discussion concerning bonuses at this meeting?

A. Yes. There was some conversation on the bonuses. As I remember, on bonuses, Mr. Dufford took the position that he [156] could not write anything such as a bonus into a contract, that it was entirely up to management whether or not and to whom a bonus would be paid, and he didn't feel that it could be written into a contract, because he

(Testimony of Roy F. Buntin.)

would then be compelled to pay a bonus. As I remember, then Mr. Fortune entered the discussion and stated that Morrison-Knudsen paid their monthly employees a bonus; however, they did not pay their hourly employees a bonus, and, as nearly as I can remember, Mr. Dufford stated that they had never discriminated between the hourly and monthly-salaried employees with respect to bonus. I believe then Baldwin made a similar statement as to what he had on sick leave, with regard to the bonus. He said, as nearly as I can remember, he said, "We will consider it discrimination if you do not continue bonuses as you have in the past or continue to pay the other employees a bonus and not the employees in this unit." As nearly as I can remember, Mr. Dufford said words to the effect that it was not his intention to discriminate against the Union employees. I believe at that time Baldwin asked if we might be excused, and we had a discussion outside the negotiations room. He asked me if I had received a bonus in past years, and I informed him that I had. And, as nearly as I can remember, he asked me if we should take Phil's word on the policy that we had been talking about in the negotiation room, and I stated words to the effect that as far as I know, why, Phil's word was good.

I believe at that time we went back into the negotiation [157] room and discussed, started discussing, wages, as nearly as I can remember. That is all I can recall being said in respect to bonuses and sick leave.

Q. That is all that you recall being said in that

(Testimony of Roy F. Buntin.)

meeting, or is that all that you recall being said in the negotiations about bonuses and sick leave?

A. Let me think a minute.

Trial Examiner: Pardon?

The Witness: Let me think a minute.

A. That is all that I can recall at present.

Q. (By Mr. Weil): During the course of the negotiations, did Mr. Dufford make any statements concerning the company's attitude toward employees who had joined the Union?

A. It was, I believe, brought out during that meeting and possibly in some of the other meetings——

Q. By "that meeting," you mean the third meeting?

A. The third meeting.

A. (Continuing): That his attitude toward the Union employees had changed and was not necessarily the attitude that he would have with other employees not included in the Union.

Trial Examiner: Who said that?

The Witness: Mr. Dufford.

A. (Continuing): He may not have said those exact words. As nearly as I can recall, that is what he said.

Trial Examiner: Which meeting was that? [158]

The Witness: The third meeting. However, I believe that was brought out in several of the meetings, that was brought up, that he didn't feel that he had the freedom to deal directly with the employees in the unit like he had with his other employees, since they were in the Union, that he had

(Testimony of Roy F. Buntin.)

to deal with the Union and not directly with the employees, and therefore, his relationship had changed.

Does that answer the question?

Q. (By Mr. Weil): Do you recall if there was any more to his statement than you last stated?

The Witness: May I have that last question read again?

(Question read.)

A. Was that in respect to the relationship between the Union employees and the other employees?

Q. (By Mr. Weil): Yes.

A. The only other statement that I think might have some bearing was the last statement that I spoke of, where he said that he did not intend to discriminate against the Union employees, concerning bonuses or sick leave.

Q. After your caucus, that is, the meeting between yourself, Mr. Stewart and Mr. Baldwin, this other meeting, did Mr. Baldwin in any respect communicate, in your presence, to Mr. Dufford the decision which was reached in that caucus?

Trial Examiner: By "caucus" you are referring to the conversation that took place outside the meeting room? [159]

Mr. Weil: Yes.

A. I can't recall at this time what might have been said after, between Mr. Baldwin and——

Q. (By Mr. Weil): Prior to this meeting out-

(Testimony of Roy F. Buntin.)

side of the room in which negotiations were being carried on, do you recall any dispute between Mr. Baldwin and Mr. Fortune?

A. Yes. There was a dispute. I will try and remember now, if I can, what it was about. I believe it concerns what was brought out yesterday, that, words to the effect that if Fortune wasn't careful, why, Baldwin might be over at M-K's trying to organize their employees.

Q. Do you recall the rest of this conversation?

A. And I believe that Ray Fortune said, as was brought out yesterday, that that was a verbal agreement between Mr. Puckett and himself and that the verbal agreement was no more, as Mr. Puckett was dead. I believe that was Baldwin's reply.

Q. Do you recall anything that followed from there?

A. I believe Fortune then said, indicating Mr. Baldwin in talking with Phil, he said, as near as I can remember: "Well, I will say one thing for this son of a bitch, you can take his word, and I have known Phil for a long time, and the same is true of him."

Q. Was there any more to the conversation, as you recall?

A. That's all I can recall of that conversation.

Q. Do you recall another negotiating meeting after that meeting? [160]

A. Yes, there was another meeting.

Q. Where was that meeting held?

A. That was held at the same place.

(Testimony of Roy F. Buntin.)

Q. With the same parties present?

A. The same parties were present.

Q. And when was it held?

A. And what?

Q. When was it held?

A. It was within a day or two. I couldn't state the exact date now that the meeting was held. It may have been the same afternoon. I believe, though, it was on another day.

Q. Was there any further discussion at this meeting about either sick leave or bonus?

A. I remember the discussions clearer than I do the meetings that they were held in. Actually there's some question in my mind as to whether the discussion I mentioned in the third meeting may have been held in the third meeting or early in the fourth. I believe, as near as I can remember, it was held in the third. However, it could have been held in the fourth meeting. As I remember, the fourth meeting was primarily concerned with the last wage proposal and the Union shop.

Q. Were those issues settled at that meeting?

A. I believe that Mr. Fortune, after some discussion on the Union shop, said to Phil, "Baldwin will never sign the contract until you include that Union shop in it, so you might as well [161] sign it." That is as near as I can remember that conversation.

There was some question through the meetings as to the length of time necessary for a new employee under the Union shop, I believe the company wanted

(Testimony of Roy F. Buntin.)

six months' time, trial, for a new employee, whereas Baldwin wanted 31 days. Now, I believe that in the fourth meeting it was finally agreed that that period would be 60 days.

Q. Do you recall whether the wage issue was settled at that meeting?

A. I believe that in, during the fourth meeting the wages were settled, subject to a vote by the employees, and I believe Mr. Dufford also said that he would have to meet with the Board of Directors.

Q. Did that then conclude the settlement of all issues before the negotiating committees or were there other issues still outstanding?

A. As I understand the question, that concluded all the outstanding issues.

Q. Was a meeting held with the employees by the Union, to your knowledge, to discuss the terms of the, or the results of the negotiations?

A. As near as I can remember, we had a meeting about the same evening to discuss the——

Q. The same?

A. The same clauses to the proposal that had been mentioned [162] during that day.

Q. The same evening as the day of the fourth meeting?

A. The same evening as the day of the fourth meeting.

Q. Did you attend that meeting?

A. Yes, I did.

Q. Can you tell me in terms of members how many of the employees were present?

(Testimony of Roy F. Buntin.)

A. I remember some talk about only one being absent from the meeting. As near as I can recall, there were 13 members in the unit at that time, so if there was one absent, I believe there must have been 12 or so present.

Q. Is that your own recollection?

A. That is my own recollection, there was only one person of the unit employees missing from that meeting.

Q. Was Mr. Baldwin present?

A. Mr. Baldwin was present.

Q. Where was that meeting held?

A. That meeting was held at the former Union hall, it was between Sixth and Seventh on Idaho Street.

Q. As a result of that meeting, the terms of the contract which was written and signed was approved by the membership?

A. Yes, they were. And at one of the meetings there was also some discussion concerning that sick leave and bonus issue.

Q. Were there more than one such meetings?

A. I believe, as near as I can recall, we probably had two [163] meetings of the employees during the negotiations.

Q. Were they held in the same place?

A. I believe they were.

Q. Do you recall who was present at the other meeting, the one other than the one you have already indicated?

A. I don't recall the exact number. I could

(Testimony of Roy F. Buntin.)

probably name a few who were present, but not the exact number.

Q. Do you recall whether it was a well-attended meeting or not?

A. It was a well-attended meeting. Certainly all but two or three, at the most, were present.

Q. Was there a discussion at that meeting of the bonus and sick leave clauses of the proposal?

A. Yes, there was a discussion at that time.

Q. What——

A. (Interrupting): The discussion, as I remember it, was concerned somewhat with the connection between the wages and the bonus.

Q. Did this discussion take place after the third meeting, did this meeting take place after the third negotiation meeting?

A. I believe that that meeting was after the third negotiation meeting.

Q. Did the discussion take into consideration the position which you have stated that your negotiating team had arrived at that third meeting?

A. Yes, there was some discussion, I remember, on the position [164] we had arrived at in the third meeting. I believe, as nearly as I can remember, there was some sort of a vote taken concerning whether or not we should take this sick leave and bonus as Mr. Baldwin understood it to be presented to him, and Speed and I, as it had been presented to the three of us, as we understood it, the people of the unit accepted.

(Testimony of Roy F. Buntin.)

Q. Just what was the proposition which they accepted, if you recall?

A. The proposition, as we understood it and presented it to the unit employees there, was that sick leave and bonuses would be continued as they had been in the past.

Q. How did the vote come out, as you recall?

A. As I remember, the vote was to accept the proposition as we had presented it to the unit employees. And it was rather a large majority.

* * *

Cross-Examination

By Mr. Smith:

Q. On direct examination, Mr. Buntin, you testified that you were hired on about August 17, 1948, is that correct? A. That is correct. [165]

Q. And your first employment with the company was in the shipping section and later in, and at the present you are counterman in the parts department, is that correct? A. That is correct.

Q. And you testified that you had received four bonuses, up to and including 1952?

A. Yes, I did.

Q. That would be for the years 1952, 1951, 1950 and 1949, is that correct?

A. That may be correct as I said it. Now, if I might add a statement here——

Q. All right.

A. I may have given the incorrect number of

(Testimony of Roy F. Buntin.)

bonuses, due to the fact that I did receive a bonus at the year's end in 1948.

Q. You are positive you received bonuses in each of the years '48 through '52, is that correct?

A. Yes, that is correct. Through '52.

Q. Then you did, in fact, receive five bonuses, not four? A. Five bonuses.

Q. How much bonus did you receive in 1952? What was the amount?

A. In dollars and cents?

Q. Yes.

A. I couldn't state the exact amount.

Q. The approximate amount? [166]

A. The approximate amount? Two hundred and—I will say approximately two hundred and seventy.

Q. In each of the five years in question, did you receive approximately that amount of bonus?

A. It would be somewhat smaller in the years preceding that, due to the fact that my salary had been increased somewhat, except the first year. I had only been there several months and apparently the bonus was based somewhat on the time I had been there. I didn't receive as large a bonus in proportion to my year's salary as I did in other years.

Q. In each case, however, it is based on approximately one month's salary?

Trial Examiner: In each case after '48, you mean?

(Testimony of Roy F. Buntin.)

Mr. Smith: Yes, even in '48 for the time worked.

A. Apparently it was.

Q. (By Mr. Smith): You state, Mr. Buntin, that you lost time due to sickness and that prior to the organization of the bargaining unit and prior to the time that you were working under the terms of the 1953 contract. Is that correct?

A. Yes, I did lose some time due to sickness.

Q. At what times and approximately what amount of time were you off work due to sickness in each, at each time?

A. As I remember, approximately the year preceding the contract signing in 1953, I was off approximately three days and, as near as I can remember, it was probably a day at a time. [167] There was no extended sickness anywhere during that period.

Q. And since the period that the '53 contract has been in effect, you have stated that you have been off some time with sickness?

A. Yes, I believe, half a day, I stated.

Q. What was your illness at that time?

A. It was a cold, I believe, as near as I can recall, it was a cold.

Q. What was the date? Would you mind repeating that, please?

A. As nearly as I can remember, I remember going back and checking the date, I believe it was February 17th.

Q. You checked that date?

A. Could I check that date?

(Testimony of Roy F. Buntin.)

Q. I asked you if you checked that date.

A. I checked the time card to see if that was correct.

Q. And that was the right date, after you checked the time card?

A. The date I found was correct. I am not exactly sure about the date, but it was close.

Q. Did you have any other sickness during the period in question, that is, from July 27, 1953, to July 27, 1954, which caused absence from work?

A. Not that I can recall.

Q. Not that you can recall. Did you take time off for any other reason than sickness during that period? [168]

A. Yes, I did take some time off for some other reasons.

Q. Any extended period of time?

A. No. As nearly as I can remember, the time that I took off would be short intervals of time to do important business down town that would require possibly a half-hour, an hour, something like that.

Q. Mr. Buntin, you say that you attended four of the meetings, negotiation meetings, on the 1954 contract. Is that correct?

A. I believe that is correct.

Q. You did not attend all of those meetings?

A. I think there was one meeting, possibly the last meeting, where the contract was signed, that I did not attend.

Q. But you attended all other meetings?

A. That is right.

(Testimony of Roy F. Buntin.)

Q. And the first of these meetings occurred approximately July 22, 1953, is that correct?

A. That is correct.

Q. At this time the Union's proposal was read to the company, in the morning session of that meeting, is that correct? A. That is correct.

Trial Examiner: By whom?

The Witness: I believe that it was read, as I remember, by the company. I might have to think on that a minute.

Q. (By Mr. Smtih): In other words, you believe——

A. (Interrupting): As I remember, there was more than one copy [169] of the proposal at the meeting. As nearly as I can remember, why, some of the proposal was read by the company, some by the Union.

Q. Was this proposal written up by the Union?

A. Well, I presume that it was written by the Union.

Q. What I mean to say, was it presented in written form to the employer at the meeting?

A. That is correct.

Q. And this proposal set out all the terms and conditions that the Union at that time requested of the employer?

A. As far as I can recall, it did contain all the requests.

Q. Do you remember any specific requests, such as a raise in hourly rates of pay?

(Testimony of Roy F. Buntin.)

A. I might not be able to quote the exact amount. However, wages were mentioned in that first proposal.

Q. And—— A. Others.

Q. Do you recall how much you were earning at that time, on the hourly basis?

A. Prior to the negotiations I had been earning approximately, in hourly—on the hourly scale?

Q. Right. A. \$1.24 per hour, I believe.

Q. After the agreement—or do you know what increase the Union was asking on your behalf? [170]

A. Could I give you an approximate figure?

Q. Yes.

A. I believe it was a dollar seventy some cents an hour, I believe.

Q. That would be an increase of how much?

Mr. Weill: I think the figures speak for themselves.

The Witness: That would be as close an estimate as I could give you, say, roughly fifty cents.

Trial Examiner: Were you at that time a counterman?

The Witness: I was at that time a counterman.

Q. (By Mr. Smith): You had the same classification you do at the present time, under the contract? A. That is correct.

Q. Even though the terminology might be different—as I understand, it was changed?

Mr. Weill: There has been no testimony of any change.

(Testimony of Roy F. Buntin.)

Mr. Smith: Well, it doesn't matter much anyway.

Q. (By Mr. Smith): Among these proposals, I understand a bonus and sick leave were proposed. Is that correct?

A. Yes, I believe I mentioned that.

Q. What amount of bonus was requested by the Union?

A. As nearly as I can remember, we requested bonuses at first to be paid equivalent to one month's salary.

Q. Did you later change your request?

A. Well, that request may have been modified or understood to [171] be modified later in the meetings, that the bonus would have been paid on the same basis as they had in the past.

Q. What basis was that?

A. Well, that would be, as far as I am concerned, that would be the basis that the older employees there had understood that they received, the equivalent of one month's salary for a bonus each year, that would be assumed that that would be continued.

Q. In other words, your request wasn't changed at all?

A. Basically, I guess the request wasn't changed at all.

Q. It's been the assumption of the Union, or your assumption, that the basis of the bonus was one month's salary, is that correct?

A. That is correct.

Q. And that was in the proposal submitted by the Union in 1953 at the first meeting?

(Testimony of Roy F. Buntin.)

A. As near as I can recall, that was in the proposal, stated in words similar to **that**.

Q. At that time was a proposal for sick leave read to the employer?

A. There was a proposal on sick leave. I don't know if I can recall exactly what it was. I don't remember if it specified the exact number of days or if it just requested that sick leave be continued as it was. I can't recall how that was specified in the first proposal.

Q. How was sick leave, what was the basis for sick leave? [172]

A. As far as the older employees understood, it was brought out at the Union meetings that as far as the older employees understood, to our knowledge, nobody had ever been docked for sick leave in past years.

Q. Then it was your understanding at that time that if a man were to fall ill and be unable to work, he would be on the payroll of Intermountain Equipment Company indefinitely? In effect, what you are asking, then, is that sick leave, that a man never be docked, you weren't asking for formal sick leave, you were asking simply that a man not be docked for sickness?

A. I don't know if I can answer that or not exactly. I don't remember exactly whether that was the intention of the proposal or not.

Q. You stated before that you proposed that the policy be continued as in the past and that in the opinion of the older men who were in the unit,

(Testimony of Roy F. Buntin.)

their understanding of the policy was that no one would be docked pay for being sick?

A. I believe, I don't know how far the understanding went, but certainly the old employees felt that they could take a day or two off without being sick, that was the understanding.

Trial Examiner: Without being sick?

The Witness: No—with a logical excuse, such as illness.

Trial Examiner: You mean without being docked, then?

The Witness: Without being docked. It might not have extended to an indefinite period. I don't think that any of the [173] older employees assumed they could be off for an indefinite period and still continue to draw their pay.

Q. (By Mr. Smith): What about a definite period?

A. There was such discussion as to days normally included in the sick leave contracts of other companies, and I believe that we may have set a number of days. However, I can't remember what the number of days might have been, whether or not the exact number of days was in the proposal or whether it was simply that sick leave be continued and carried as it had in the past, I can't recall definitely.

Q. At the third meeting, now, when did that occur?

A. I can't remember the exact date of the meeting, other than the first and second. I can't remem-

(Testimony of Roy F. Buntin.)

ber if the third meeting was one day following the first—or it might have been two days—maybe it was the next day. I can't remember the exact date.

Q. And it is in your memory, however, that it was at the third meeting that the issues of wages, bonuses and sick leave were most fully discussed? Is that correct? A. That is correct.

Q. And at that meeting Mr. Fortune did not get into the sick leave discussion, is that correct?

A. Let's see. I believe I stated that Ray Fortune did get into the discussion during one of the meetings.

Q. You did state that Mr. Fortune did not get into the sick leave discussion at the third [174] meeting. A. At the third meeting?

Q. Was Mr. Fortune, in fact, even there?

A. As near as I can remember, Mr. Fortune was present at all the meetings that I was present at. He was present at that third meeting. [175]

* * *

After Recess

(Whereupon, the hearing was resumed, pursuant to the taking of the recess, at 2:00 o'clock, p.m.)

Trial Examiner: The hearing is in order.

Mr. Smith was in the process of examining a witness.

Mr. Smith: Would the reporter read the last

(Testimony of Roy F. Buntin.)

question and the answer thereto, that was stated before the recess?

(Question and answer were read as follows:)

“Q. Was Mr. Fortune, in fact, even there?

“A. As near as I can remember, Mr. Fortune was present at all the meetings that I was present at. He was present at that third meeting.”

Q. (By Mr. Smith): Mr. Buntin, on direct examination you said that Mr. Dufford's attitude had changed since the Union was certified as the bargaining agent for the unit in question. Is that correct?

* * *

A. Let's see. As I understand it, I said that his attitude changed in respect to the employees in the unit—I believe, yes, [176] his attitude had changed, I believe I testified that way.

Q. (By Mr. Smith): In what respect had Mr. Dufford's attitude changed?

A. As near as I can remember, he said that he could not approach the persons in the unit like he could his other employees or like he could the unit employees before they joined the Union; he had to approach the Union as the bargaining agent, he didn't feel free to approach the employees on a personal basis. Words to that effect.

Q. Would you call such an attitude anti Union?

* * *

A. The general impression I received was that

(Testimony of Roy F. Buntin.)

Mr. Dufford had an unfriendly attitude for some time after the Union was certified. [177]

* * *

Q. (By Mr. Smith): Mr. Buntin, other than the statements you have previously referred to as expressions of Mr. Dufford's attitude—or changed attitude, I should say—did he at any time since certification of the bargaining unit make other statements or expressions which would indicate that his attitude had changed?

A. If I understand this question correctly, that would be after this apparent change of attitude in the third or fourth meeting—is that what you are referring to—or since the absolute certification?

Q. Since the certification.

The Witness: Repeat that question, please.

Trial Examiner: Read the question.

(Question read.)

A. As I understand that, that his attitude might have changed from an unfriendly attitude to a more friendly attitude.

Q. (By Mr. Smith): You say it had changed from an unfriendly attitude to a more friendly attitude?

A. Possibly during the last two sessions of bargaining, there was semblance of a friendly attitude reached.

Q. During bargaining, however, the atmosphere

(Testimony of Roy F. Buntin.)

was unfriendly, during the early stages or first few meetings?

A. Probably the most heated argument came during the third meeting. I don't believe there was any unfriendly argument, possibly, at any other time, and I wouldn't say that that was absolutely unfriendly.

Q. What was that argument concerning?

A. It was concerning the bonus issue, as I remember, the most heated argument concerned the bonus issue.

Q. Subsequent to negotiations and after the contract had been entered into in 1953, did Mr. Dufford take any action or make any statement which reflected an anti-Union attitude?

A. No, I don't believe he made any statement, as I remember, that reflected an unfriendly attitude.

Q. Has Mr. Dufford ever refused to meet with you at your [179] request or with the bargaining unit which you represent, at your request or Mr. Baldwin's request, to your knowledge?

A. No. The meetings might have been delayed sometimes because he wasn't available for some reason, but I don't recall of any meeting being refused.

Q. Has Mr. Dufford, to your knowledge, ever refused to discuss any matter involving the terms or conditions of your employment or the Union contract, with you or with the bargaining unit?

A. Not that I recall.

Q. You state that following the third meeting, or

(Testimony of Roy F. Buntin.)

in the third meeting, Mr. Dufford stated that he would have to meet with his Board of Directors?

A. I was, I believe that I said that was in the fourth meeting, that he said that, I was inclined to believe that was in the fourth meeting.

Q. At the time of the fourth meeting substantially all issues had been decided, is that correct?

A. At the beginning of the fourth meeting?

Q. Yes.

A. As near as I can remember, everything had been settled at the beginning of the fourth meeting, with the exception of the Union shop and wages.

Q. Now, at the end of the third meeting, you had taken the proposals of, or that is, the substantial agreement to the membership of the Union for approval, is that correct? [180]

A. As I remember, after that meeting, we took the proposals, as such, to the members for voting.

Q. Yes. And at that time you discussed sick leave and bonus issues, at that membership meeting?

A. I am quite sure it was at that meeting that we discussed sick leave and bonus.

Q. Was anyone present at that meeting other than members of the Union?

A. No. As I remember, Frank Baldwin—I guess you would consider the Union officials members of the Union.

Q. Yes.

A. No. There wouldn't be anyone there except members of the Union. [181]

(Testimony of Roy F. Buntin.)

Q. (By Mr. Smith): At the meeting of the membership, following the third negotiation meeting, was the agreement as to wages, or wage increases accepted by the membership, approved by the membership?

A. I can't recall at this time exactly when the wage proposal came in. There were wage proposals went back and forth, of course, but I can't remember wages being discussed at the meeting. They probably were.

Q. At any of the Union membership meetings, at the time of the [182] negotiations, were wages discussed?

A. Yes, they were discussed, very likely at that meeting, but I don't recall definitely that they were discussed at that meeting of the employees.

Q. Were they discussed at the second meeting, which I understand followed the fourth negotiation meeting?

A. I am quite sure that the wages were discussed at that meeting. As I remember, we took a vote, in fact, on the final proposition as it had been presented, something like that.

Q. I see.

A. We took a vote on wages during a meeting of the employees following the fourth negotiating meeting.

Q. Did you take a vote on bonus and sick leave?

A. I believe in the meeting following the third negotiation meeting we took some sort of a vote on bonus and sick leave, as Baldwin and Stewart and I presented it to the employees and as we under-

(Testimony of Roy F. Buntin.)

stood it. I don't remember whether it was a show of hands or what sort of a vote it was, but there was some sort of a vote, I believe. [183]

* * *

Q. Did you at any time from the date your pay check was docked [184] for the time you lost because of sickness make a claim or ask the employer to reimburse you for the amount of sick leave—for that amount of time lost, I should say?

A. No. I don't recall making any claim for that sick leave. As I remember, I mentioned that at some kind of a hearing concerning the N.L.R.B., and I believe they picked up that information.

Q. What hearing was this, Mr. Buntin?

A. I was trying to think. It may not have been a hearing. There was a representative down from Seattle. I can't recall now his name. As I remember we were sitting in the Union office and discussing, possibly, the bonus issue, and the sick leave issue was mentioned.

Q. What time was this, Mr. Buntin, that you mentioned it, that it was mentioned?

A. It was in the evening, I believe it was a meeting we had in the evening.

Q. Approximately what date?

A. I am not sure of the date.

Q. Approximately what month?

A. Even approximately. Well, the approximate month, I will say, was March.

Q. March?

A. Thereabouts.

(Testimony of Roy F. Buntin.)

Q. This was the first mention you made of the fact that you [185] had been docked for time you were absent because of sickness?

A. There was one other time it was mentioned. When I got back from being sick—I was off one morning, came to work at noon, and I told the parts department manager, Jess Kight, what had happened and that that should be counted as sick leave.

Q. You made that statement?

A. I made that statement. And he did not disagree with me. So I assumed that it would be counted as sick leave. However, I didn't make any claim, as I remember, at my next pay period.

Q. At the next payday you recognized the fact that you had been docked for time on that day, is that correct? A. Yes, that is correct.

Q. Mr. Buntin, I hand you General Counsel's Exhibit No. 3, which has been admitted into evidence. Would you read——

* * *

Mr. Smith: Article VI, I believe, of that, of General Counsel's Exhibit No. 3, which is the 1953-54 contract. [186]

* * *

A. Yes, I am familiar with that.

Q. (By Mr. Smith): Did you make a claim for payment of wages in accordance with the terms of that paragraph?

(Testimony of Roy F. Buntin.)

A. No, I don't recall making a claim.

Q. Why didn't you make a claim under the provisions of that paragraph?

* * *

A. I don't remember any reason for not filing a complaint.

Q. (By Mr. Smith): Did you honestly believe that under the contract or otherwise you had a claim for wages not paid?

A. I honestly believed I did, even though sick leave wasn't stipulated in the contract, I felt that after negotiations, in fact, I felt when I took that half-day off for sick leave, that I would be paid for it, the same as I had in the past. That is what I honestly felt. [187]

* * *

Trial Examiner: All right.

Are you differentiating a formal claim from talking with somebody about the situation?

The Witness: A formal claim would be a claim in writing or some sort of a legal——

Trial Examiner: All right, let me ask you, then, did you speak to your supervisor or anyone else about the fact that you had been docked and that you thought you ought not to have been docked?

The Witness: I don't believe so. However, I can't honestly say. I don't remember.

Q. (By Mr. Smith): Mr. Buntin, did you at any time request the payment of a bonus from the employer?

(Testimony of Roy F. Buntin.)

Mr. Weil: Objection.

Trial Examiner: Let me see what you are basing that on, what section of the contract. Is that under the grievance section?

Mr. Smith: Yes.

Mr. Nielson: Under Article VI?

Trial Examiner: No, under Article XII, I believe was what he was referring to.

I will overrule the objection. You may answer.

The Witness: May I have the question repeated again? [188]

Q. (By Mr. Smith): Mr. Buntin, did you at any time make a claim for a payment of bonus?

A. Not other than possibly the charge which has been brought to the attention of the Board here.

Trial Examiner: That is, individually, you did not do it?

The Witness: Individually I did not, that I recall, make any claim. [189]

* * *

ALVIN M. STEWART

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner: What is your full name?

The Witness: Alvin M. Stewart.

Trial Examiner: And your home address?

The Witness: 2624 Idaho Street.

Trial Examiner: Boise, Idaho?

The Witness: Boise, Idaho.

(Testimony of Alvin M. Stewart.)

Direct Examination

By Mr. Weil:

Q. Have you a nickname, Mr. Stewart?

A. Yes.

Q. What is that? A. "Speed."

Q. Are you the Speed Stewart who has been referred to in this hearing? A. Yes, sir.

Q. Mr. Stewart, are you employed by the respondent, Intermountain Equipment Company?

A. Yes.

Q. When did you first become an employee of that company? A. January 1, 1952.

Q. In what capacity were you then hired by the company? A. Back-order clerk.

Q. Have you been continuously employed by that employer up to [193] the present time?

A. Yes.

Q. Have you been employed in that same capacity during that period? A. Yes.

Q. Have you ever received a bonus from the company? A. Yes.

Q. When?

A. The Christmas season of 1952.

Q. Did you receive one in 1953? A. No.

Q. In terms of your annual wage, how much was the bonus?

A. It was approximately one month's wages.

Q. When you were hired by the company, was the bonus given to you? A. Yes.

(Testimony of Alvin M. Stewart.)

Q. By whom? A. By Mr. Kight.

Q. Where was that?

A. At Intermountain Equipment Company.

Q. Will you tell us what Mr. Kight said and what you said?

A. Well, we had talked and had quite a lengthy discussion as to the wage scale, the hours, and I had made the objection about the wages, that it wasn't very much more than what I had been receiving at my present employer, and with that, Mr. [194] Kight mentioned the bonus and said that they had received it, he had always received it as long as he had been with the company, and that it was equivalent or approximately a month's wages, so that you could actually figure a 13-month year, in pay.

Q. Did you ever have occasion to take off because you were sick prior to the contract in 1953?

A. No.

Q. Have you had occasion since the contract in 1953?

A. Just small periods, I have been off on sick leave, but it was just a matter of 15 minutes, 20 minutes or a half-hour.

Q. Were those small periods frequent?

A. Yes, treatment, doctor's treatment.

Q. Were you paid for any of them?

A. No, but I did not figure the time involved because it was such a small amount of time that I did not——

(Testimony of Alvin M. Stewart.)

Q. How many such periods were there, approximately?

A. Well, it was between the months of, oh, the latter part of August, and it ran until—that was August of '53—and it ran until March of '54.

Q. How frequent were these treatments?

A. Well, at the first of the treatment they were quite frequent, every day, every other day, and up until the last month, two months, why, they was two or three weeks apart, perhaps even a month apart at the last.

Q. Do you have any idea how much actual time you lost as a [195] result of those appointments?

A. No. As I said, I never did keep track. I could approximate the time but it would surely be just a little while.

Q. After the election which was held in your unit did you attend any negotiating sessions?

A. Yes, I was elected by the employees in the unit to sit in on the negotiations and in at the negotiating table.

Q. Did you attend all negotiation sessions, so far as you know?

A. To the best of my knowledge, I attended all meetings.

Q. You have heard the testimony of Mr. Buntin concerning who were present at these meetings?

A. Yes, sir.

Q. Is it your recollection that that testimony was correct?

A. Yes, sir.

Q. Specifically as to Mr. Fortune, was Mr. For-

(Testimony of Alvin M. Stewart.)

tune present at each meeting that you were present?

A. Yes.

Q. When were these meetings held, if you recall?

A. Well, I couldn't recall the exact dates, but it was the latter part of July of '53.

Q. Drawing your attention to the first such meeting, will you tell us what took place at that meeting?

A. Well, at the first meeting it was just more or less just a get-acquainted session, it was held in the morning, if I remember correctly, and we discussed our proposition or agreement [196] that we submitted to Mr. Dufford and the company. At that time Mr. Baldwin read the proposals and we tried to cover the whole proposal and explain our position in regards to the proposal, and the morning was just about composed of the reading of the proposal. At the afternoon session, as I remember, we convened at approximately 2:00 o'clock and went into further discussion on the proposal. There was a few items there that was not too clear to Mr. Dufford, as to what our meaning was. I remember one particular phrase in our proposal which called for special privileges, in which Mr. Dufford could not understand what we wanted in regard to special privileges. And we explained that phase of the proposal.

Q. Do you recall anything else that took place at the second meeting? A. The second?

Q. The afternoon meeting.

A. The afternoon meeting, that one session there? Nothing that I can remember that stands out.

(Testimony of Alvin M. Stewart.)

Q. Referring to the third session, can you tell me when that was held?

A. Well, if I remember correctly, our third session followed on the following day or the day after.

Q. Will you tell us what you recall that took place at that session?

A. Well, the third session was just a little bit heavier than [197] the first, in view of the fact that we went through the sick leave clause, the bonus clause, holidays and wages. We had covered quite a—and also the Union shop, I might mention—and the first part of the morning session, as I recall, was, we summarized how we had progressed the day before and then started from there on working out, trying to reach an agreement on sick leave, bonuses and wages. I just want to think a little bit here. Let me see. I can't think of anything.

Q. Do you recall the discussion concerning sick leave?

A. On sick leave, the second session, we just discussed largely at it, in the over-all discussion, in the morning and also in the afternoon, on sick leave. We covered at that meeting largely the over-all and Union shop, if I remember correctly, on the second group of meetings, was the largest discussion, which was held on Union shop, trying to explain the principles and the why and wherefore of the Union shop. And at the later, closing session we did discuss, Mr. Dufford said that our wage scale was too high and he didn't quite understand the structure of our setup on wages, on which we went into quite a

(Testimony of Alvin M. Stewart.)

thorough discussion of the wage scale, and he made the statement that it was a little bit too high, so Mr. Baldwin called Mr. Buntin and myself out for a little talk and we discussed the changes of the wages and coming to an agreement on the wage scale, so we reduced our original demands, which, for the top bracket, was \$1.75 per hour. We reduced that to \$1.60 per hour and made other changes in the [198] wage scale and went into the meeting again and presented our counterproposal to Mr. Dufford and Mr. Fortune.

Q. What else took place at that meeting, that you recall, if anything?

A. Nothing that I remember took place.

Q. Do you recall another meeting thereafter?

A. Yes, there was another meeting after that date. And in this particular meeting, I remember quite well, because there was quite heated discussions during the course of the meeting which made me well remember the meeting.

Q. Will you tell us what took place and what the discussions were about?

A. The discussions were entirely on sick leave. And on this point of the argument, at this point, I can remember that we had asked Mr. Dufford for, in our proposal, for six or ten days, I do not remember the specified amount, but during the discussion we asked Mr. Dufford why he would not agree to put in the contract the specified amount of days of sick leave. And Mr. Dufford gave the reply that he felt that employees would take advantage of the

(Testimony of Alvin M. Stewart.)

amount of days that we specified in the contract and for that reason he would not like to put it in the contract. But at that time, I am quite sure that I raised the question about sick leave and I recall going along with Mr. Dufford's version of that, because I had known of employees out at Gowen Field that had abused the privilege. And at that [199] point Mr. Dufford said that he was proud that the company, on their, with regard to their sick leave clause, asked if there was any reasons why we wanted it in the contract, if we weren't satisfied with the way the company had handled sick leave in the past. And we said no, that—that is, I had said no, that I hadn't ever taken any sick leave, but it was heard from the other boys in the unit and the company that it was very satisfactory. And Mr. Dufford said that the company was very proud of their sick leave record and the fact is they had one man that had polio and was off for quite some period of time there and he was never docked for sick leave, and that Intermountain Company was very proud of their sick leave record. And at this point, why, Mr. Baldwin asked Mr. Dufford if he would change the policy of the company and Mr. Dufford stated that he did not see anything in the near future that would justify the changing of the policy. And they went, from that discussion we batted it around a little bit and then we went to the bonus clause. And I can remember this point of the argument pretty well because of the heated argu-

(Testimony of Alvin M. Stewart.)

ment that, at the time anyway I thought it was a heated argument, or the language that was used by Mr. Fortune and Mr. Baldwin, whereas we asked Mr. Dufford for his standing on the bonus, which he had told us several times during the previous discussions, that, when we had asked him why he could not put it in the contract, were milder terms than that, and Mr. Dufford stated that if he put it in the contract in black and white he would be committing [200] the company to pay us a bonus, whether or not the company showed any profit the following year or not, and that they would be compelled to pay us in the unit a bonus whether they paid the other employees of the company a bonus or not, and he could not have that in the contract. Whereas, Mr. Baldwin raised the question to Mr. Dufford, if the other members in the unit would be paid a bonus, that the members of our Union would be paid a like bonus or if he didn't, in other words, he would be getting his teat in a wringer and we would call it discrimination. So Mr. Dufford said that he did not see anything in the near future or any reason why the company would not resume the same policy as it had in the past, and that if one employee received a bonus all of them would. And after Mr. Dufford made this remark, Mr. Ray Fortune entered and looked at Mr. Baldwin and said, "You heard what the man said," and Mr. Baldwin looked back over at Mr. Fortune and said, "You'd better be careful, Buster, or I am going to

(Testimony of Alvin M. Stewart.)

go over and knock on your door and organize your shop." And Mr. Fortune said, "You have got a verbal agreement, you son of a bitch, with us, that you wouldn't do that." And Mr. Baldwin said, "That verbal agreement was with Mr. Puckett and when Mr. Puckett died that agreement also died." And Mr. Fortune looked at Mr. Baldwin and pointed across the table to him and said, "That old son of a bitch, you can believe every word he tells you." And he looked vice-versa at Mr. Dufford, pointed to Phil and to Mr. Baldwin and said, "You can also [201] believe everything that Mr. Dufford tells you." So at this point of the discussion, Mr. Baldwin, after a few words, minor words, were said, then Mr. Baldwin asked Mr. Buntin and myself out into the ante-room or room across the hall, at which point he asked me and Mr. Buntin if we believed Mr. Dufford's side of the story, which, me being the younger of the two, I said well, that I didn't know, and so Mr. Buntin said that he had been in the company several years longer than I had, three or four years, some such matter, and that he had always received a bonus and he felt sure that the company would pay the bonuses. Well, with that in mind, I knew I had received a bonus the year before and I told him I thought Mr. Dufford's verbal agreement would be all right. So after we had our little five- or ten-minute conference we went back into the main room and took up the matter of wages. We had submitted a counterproposal to the company for a little reduction in our wage scale, on which the company

(Testimony of Alvin M. Stewart.)

was to act, and if I remember correctly, the company had submitted and come back into the meeting that day with a proposal, proposal on wages that they had drafted, and we were still quite a ways apart on wages. And we had discussed at the last part of the meeting the wage scale and tried to get together and Mr. Baldwin was trying to split the difference and reach an agreement on the wage scale, to which the company submitted to us their counterproposal, and, as I remember, the meeting adjourned for that day, that session.

Q. Was there another meeting which you [202] attended? A. Yes.

Mr. Smith: Would you make your question a little more specific? I am getting confused as to what meetings we are referring to.

Trial Examiner: You were just talking about the second day?

The Witness: A couple of days we had two meetings, and then one day one meeting.

Q. (By Mr. Weil): After this meeting which we have characterized in the past as the third meeting, did you attend the meeting which has been discussed as the fourth meeting?

A. Yes, the fourth meeting, at which agreement was reached on wages, and we cleared up the matter of the Union shop. [203]

* * *

(Testimony of Alvin M. Stewart.)

Cross-Examination

By Mr. Smith:

Q. Mr. Stewart, when you were in the process of being hired by Mr. Kight, you stated that he mentioned payment of a bonus. Is that correct?

A. Yes, sir.

Q. That is correct. And also at that time you state that he mentioned that he had always received approximately one month's salary for a bonus?

A. I did not say that, sir. He said that it would be approximately that.

Q. I see.

A. Not that he had received approximately——

Q. You did say that he had always in the past received one himself?

A. He had always in the past received one himself. [204]

* * *

Q. (By Mr. Smith): Mr. Stewart, you mentioned a special-privileges clause in the first proposal submitted by the Union in the 1953 negotiations. Is that correct? A. Yes.

Q. Would you explain what the special-privileges clause contained in it?

A. Well, if I remember right, we had asked that the employees would not lose any of the special privileges that they now enjoyed with the company.

Q. Such privileges as what? [207]

A. Well, as coffee break, a few of the privileges.

(Testimony of Alvin M. Stewart.)

The boys would maybe take 10 or 15 minutes off to go uptown to the bank, various little—that was largely the ones that we had in mind, that we discussed.

Q. Wasn't the bonus one of these privileges?

A. No, sir.

Q. Or a special concession?

A. No, sir. The bonus was a separate part of the proposal. [208]

* * *

Q. Now, at the third meeting you testified that you had heated discussion on sick leave and the bonus. Is that correct?

A. That is correct. I think I made the statement that it was a rather heated discussion, [209] argument.

* * *

Q. (By Mr. Smith): I understood you to say that Mr. Dufford stated something and Mr. Fortune came through the door and he says, "You can believe that." And then——

Mr. Weil: I have no recollection of that.

Q. (By Mr. Smith): Or Mr. Fortune made some kind of a statement like that and then Mr. Baldwin——

A. That was a discussion between Mr. Baldwin and Mr. Fortune. Mr. Dufford had made the statement about the bonuses.

Q. And what had he said?

A. He had made the statement that he would not change the policy, whereby Mr. Baldwin entered and said, "If you pay one employee a bonus, you

(Testimony of Alvin M. Stewart.)

should pay all employees a bonus. If you neglect the men of our unit, we will call it discrimination." [210] At that point Mr. Fortune stepped in and said, "You heard the man"—that is when he referred to, motioned to Mr. Baldwin and said, "Now the monkey is on your back," at which Mr. Fortune, I mean Mr. Baldwin, corrected him and came back and said, "Well, you so and so, I will be over there knocking on your door, Buster, and organizing you." Is that what you wanted?

Q. That is correct. Well, I am afraid I am a pretty thick man, Mr. Stewart, but that just doesn't sink through my mind.

Trial Examiner: Perhaps you don't know the expression, "the monkey is on his back."

Mr. Smith: Perhaps I don't.

Q. (By Mr. Smith): What does it mean?

A. That means it was Mr. Baldwin's turn to speak, the monkey was on his back, he was being relieved of the argument and Mr. Baldwin was to answer.

Mr. Weil: He had the duty to go forward with the evidence at that time.

Mr. Smith: Thank you.

Q. (By Mr. Smith): And Mr. Baldwin's answer to that was his remark to Mr. Fortune?

A. His remark to Mr. Fortune and Mr. Fortune back to Mr. Baldwin, to Mr. Dufford.

Q. All right. After that story you and Mr. Baldwin and Mr. Buntin left the room and caucused?

(Testimony of Alvin M. Stewart.)

A. Mr. Baldwin and Mr. Buntin and [211] myself.

Q. And at that time Mr. Baldwin asked both you gentlemen if you believed Mr. Dufford?

A. That is right.

Q. Did you at any time, Mr. Stewart, or to your knowledge, Mr. Baldwin or Mr. Buntin, did they at any time come back into the room and say to Mr. Dufford, "I believe you," or words to that effect?

A. Not that I can remember.

Q. As a matter of fact, Mr. Stewart, were you at all positive of what Mr. Dufford's statement meant?

A. Yes, because that was the reason for our arguments and our negotiations. We were arguing on these points and they were the main factors we were arguing about at the time of this meeting and our points of discussion of the day.

* * *

Trial Examiner: On the record.

With respect to the time that you lost because of illness between August, 1953, and March, 1954, for which lost time you testified that you were not paid, did you thereafter at any time—when I say "thereafter" I mean any specific absence for which you were not paid—speak to any representative of management, calling attention to the fact that you were not paid? [212]

The Witness: No.

Trial Examiner: And suggesting that you ought to be?

(Testimony of Alvin M. Stewart.)

The Witness: No.

Trial Examiner: Was there any reason that you did not do that?

The Witness: Other than the fact was that the boys had informed me they had not been getting paid for sick leave and mine was in small dribbles, was nothing to the extent of a day or half a day, so I just forgot the matter entirely. [213]

* * *

Mr. Smith: I wish to call Mr. Baldwin under Rule 43 (b).

F. T. BALDWIN

having been previously sworn, resumed the stand and testified further as follows:

Trial Examiner: Your oath covers the entire proceeding, Mr. Baldwin.

The Witness: Yes, sir.

Direct Examination

By Mr. Smith:

Q. You are Mr. Frank Baldwin?

A. That is right.

Q. What is your occupation, Mr. Baldwin?

A. Secretary-treasurer of Local 483, A.F.L.

Q. You are a resident of Boise, Idaho?

A. Yes, sir.

Q. You are the business agent of the charging Union in this [230] case?

A. Secretary-treasurer.

(Testimony of Frank T. Baldwin.)

Q. Secretary-treasurer, yes.

Mr. Baldwin, are you familiar with the provisions of the contract between respondent and the Union, dated July 27, 1953? A. Yes, fairly well.

Q. You testify that you are familiar with the negotiations leading up to the signing of that contract? A. Yes.

Q. As a matter of fact, you were the chief negotiator for the Union in those negotiations?

A. Yes.

Q. In your first proposal to the employer leading up to those negotiations, did you include in that proposal a provision for bonus?

A. As near as I can remember, yes, we did.

Q. And did you include also in that proposal a provision for sick leave?

A. Yes, as near as I can remember, they are both in there.

Q. How many days' sick leave did you request in your proposal?

A. I believe there were six or seven. I am not positive which, now. I think it was six, I believe.

Q. As a matter of fact, didn't you ask for 10 days' sick leave in that proposal?

A. Not to the best of my knowledge. No. However, it could [231] have been that we were discussing the previous practice of the employer as far as sick leave was concerned.

* * *

Q. When were you first notified that sick leave

(Testimony of Frank T. Baldwin.)

had not been paid by the employer to a member or members of the bargaining unit?

A. As near as I can remember, it was after the 1st of the year—that would be 1954.

Q. Approximately what date?

A. Around January the 3rd or 4th, I believe.

Q. Who first notified you that they had not been paid a bonus?

A. Well, it was discussed by some of the employees in our meeting, I believe, is where it first came out on the floor.

Q. Yes?

A. It was some of the employees—I don't remember which one now—after the 1st of the year. It seems as though some employees had lost some time in between Christmas and New Year's. If my memory serves me right, I believe that is when my attention was first called to the sick leave.

Q. You don't recall who that employee [232] was?

A. No, I don't now.

Q. Was attention called to sick leave only at that meeting?

A. As near as I can remember, that is right, because we had previously discussed the bonus.

Q. When were you first notified that the bonus had not been paid?

A. Well, that was around the, somewhere previous to this time. It was after, between Christmas and New Year's. I think that the previous practice, if my memory serves me right, the boys had said they were paid after Christmas or immediately

(Testimony of Frank T. Baldwin.)

before Christmas or sometime around Christmas, they had said, I believe, that they received the bonus checks.

Q. They said that they had received them?

A. No, that they had previously received them. It was around Christmastime of each year, previously.

Q. Did you advise these employees, or any group of employees, to take any action with respect to bonus?

A. What do you mean by that?

Q. Did you advise them to take any action with respect to nonpayment of bonus?

A. No, other than that the Union would contact the employer.

Q. Did you contact the employer relative to bonus?

A. Well, we had discussed it previously in two meetings with Mr. Dufford. We had two meetings regarding the hours being changed from, let's say Monday morning at 8 o'clock to Monday [233] noon.

Q. Where were these meetings?

A. I don't remember the dates, but they were sometime between the time the contract was signed and December of the same year. We had had two meetings on the hours, changing the hours.

Q. You didn't object prior to that time to the employer not paying bonuses, did you?

A. Well, of course, that was before December 25th, and we didn't know yet.

(Testimony of Frank T. Baldwin.)

Q. After December 25th did you bring this to the employer's attention?

A. On bonuses not being paid or sick leave?

Q. Correct, bonuses.

A. As near as I can remember, we didn't discuss that until the meeting—or it wasn't the meeting—a telephone conversation, as near as I can remember, January 4th, somewhere in there around that date. It wasn't a meeting; it was a telephone conversation.

Q. Did you discuss sick leave during that telephone conversation? A. Yes.

Q. And bonuses, too? A. Yes.

Q. Did you at any time advise any employees in the bargaining unit to submit a claim for wages not paid under the provisions of Article VI of the contract? [234]

* * *

A. No, I did not.

Q. Would you state the reason why you did not?

A. Well, the Union's contention was that it's not covered, bonuses and sick leave was not covered in this agreement, and in the claim for wages, under Article VI would have to be made within 30 days of the day the employee is paid for the period in which wages are claimed, so we would have had to pay them, in my interpretation, every 30 days after the contract was signed until the contract expired.

Q. No claims were made?

A. No, I don't think so.

(Testimony of Frank T. Baldwin.)

Q. Did you advise any employees or did you take action yourself under Article XII of that contract?

A. Article XII is arbitration. No, we did not.

Q. Would you state your reason why you did not?

Mr. Weil: May I have a continuing objection to this line?

Trial Examiner: You may.

A. Well, as I stated in answer to your previous question, it was not covered by the contract.

Q. Would you read the first two lines of Article XII of GC-3 [235] of the contract?

A. Article XII: "Grievances or Disputes. Any employee or group of employees having grievances or disputes"——

Trial Examiner: Don't read it out loud. It's in the record already. Just read it to yourself.

The Witness: I am familiar with it.

Q. (By Mr. Smith): Mr. Baldwin, during July, 1954, did you enter into negotiations with respondent for a contract to cover the period from July 27, 1954, to July 27, 1955? A. Yes, sir.

Q. During these negotiations, did you propose that the respondent should pay sick leave?

A. Yes.

Q. And what disposition was made in the contract as a result of these negotiations as to sick leave?

A. Well, the contract presently in effect now provides for sick leave.

(Testimony of Frank T. Baldwin.)

Q. How many days?

A. If I remember correctly, it's six.

Q. Now, Mr. Baldwin, did you in your proposal, in the 1954 negotiations, propose the payment of bonus by respondent? A. Yes.

Q. What disposition was made of bonus?

A. Well, it's not covered in the agreement.

Q. Do you have an agreement with respondent to pay bonus? [236]

Trial Examiner: You mean a collateral agreement?

Mr. Smith: Collateral agreement.

A. You mean the years 1954-55?

Q. (By Mr. Smith): That is correct.

A. No.

* * *

Q. (By Mr. Smith): In the 1954-55 negotiations, did the Union withdraw their demand for bonus? A. Yes.

Q. Bonuses were, however, discussed during those negotiations? A. Yes.

* * *

Q. Throughout your experience with respondent, have you found respondent willing to bargain with you at all times?

A. I would say yes. [237]

Q. Have you found them generally friendly or unfriendly in attitude toward you?

Mr. Weil: I object.

Trial Examiner: Oh, I think I will allow that.

(Testimony of Frank T. Baldwin.)

A. Well, let me inquire please, in your question meaning friendly, how do you mean that "friendly or unfriendly"?

Q. That is, willing to agree to any proposals?

A. Yes, I will agree to that question.

Q. Willing to discuss grievances?

A. As near as I can remember, yes.

Q. Arising from the negotiations in 1953, leading to the contract of July 27, 1953, were you able to secure substantial hourly rate increases for the men in the unit?

A. I think they received a fair increase, yes. I would like to answer that further, but——

Q. No, that is enough. What was the approximation of the amount?

Trial Examiner: You mean percentagewise?

Q. (By Mr. Smith): Well, say, from what figure, the average figure, to what average figure?

A. Well, I don't exactly remember for this reason, they were on a monthly rate of pay of some sort previously, although I think it was based on the hourly rate of pay, but they received their pay once a month. And under the contract that was signed, they were paid by the hour once a month with a drawing period, [238] meaning that they could draw a portion of their money, I believe on the 15th, and the balance on the 31st, so I do not remember the hourly rate of pay that they received, no.

Trial Examiner: This is the '53 contract you are talking about?

(Testimony of Frank T. Baldwin.)

Mr. Smith: Yes. [239]

* * *

Q. (By Mr. Smith): You are aware of the fact, if not from your personal experience—well, you are aware of the fact that Mr. Stewart had this infection in his ear which required doctor's care from approximately the latter part of August through the Spring of 1954, weren't you?

A. No, I am not aware of Mr. Stewart's sickness. No.

Q. You did not——

A. (Interrupting): Let me change that. I am now, because he testified about it the other [240] day.

* * *

Mr. Smith: Mr. Dufford, will you take the stand?

PHILIP A. DUFFORD

having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

Trial Examiner: You are the same Mr. Dufford who was previously sworn and gave testimony in this hearing?

The Witness: I think so.

Trial Examiner: At least in appearance.

The Witness: Yes.

Q. (By Mr. Smith): What is your occupation, Mr. Dufford?

(Testimony of Philip A. Dufford.)

A. I am general manager of the Intermountain Equipment Company, Boise, Idaho.

Q. What are your duties with the Intermountain Equipment Company?

A. General direction of the Company's affairs as to all phases of the business.

Q. Do your duties include handling of personnel affairs?

A. To some extent, yes, as far as responsibility is concerned.

Q. Mr. Dufford, during the years 1950, '51, '52, did you pay any bonuses to substantially all the employees at Intermountain [241] Equipment Company? A. Yes.

Q. During those years, did you have a set practice or custom in respect to bonuses?

A. No. It was a management matter.

Q. During those years, did you have a set policy affected in any way by Federal law?

A. There were times during that period when we were governed by regulations of the Wage Stabilization Board and, to the extent of compliance with those regulations, we were regulated or bound by the laws that applied. [242]

* * *

Q. (By Mr. Smith): To the best of your recollection, Mr. Dufford, what was said by the parties to the agreement, or in negotiations, I should say, relative to bonus and sick leave?

Trial Examiner: Try to fix it as to the particular meeting, if you can.

(Testimony of Philip A. Dufford.)

Q. (By Mr. Smith): Mr. Dufford, were there several negotiation meetings? A. Yes.

Q. Bearing these meetings in mind, will you specify at which meetings was there discussion of bonus and sick leave?

A. It's more difficult for me to fix meetings one, two, three, and four, and what seems to have transpired than it has been for the rest of the people. I know that during the course of the negotiations, we discussed these and many other items at length. Considerable discussion was had relative to bonus. It is my recollection that sick leave received strictly a secondary position [244] as far as being an issue. And, of course, as these meetings progressed, final conclusions as to a contract were drawn toward the latter sessions.

Q. During these negotiations, did you have conversations, and what was the nature of these conversations, concerning bonus and sick leave and the disposition of bonus and sick leave?

A. Well, the disposition was that a contract was drawn and signed by both parties, in which reference or provision relative to bonus and sick leave were omitted.

Q. Can you recollect, during these negotiations, did you make any definite statements? Can you remember the wording of any particular statements that you made relative to bonus and sick leave?

A. I can remember the substance of the discussions.

(Testimony of Philip A. Dufford.)

Q. Would you state those, the substances of those discussions?

A. I stated the Company had no set policy regarding payment of bonus and that it was strictly a right of management to, always had been, to determine whether or not bonus would be paid; if paid, paid to whom and how; it was strictly a management proposition, and that, further, that we had never had any written agreement with any employee for the payment of a bonus.

Q. Were wage increases a proposal at these negotiations? A. Yes.

Q. Arising out of these negotiations, did the employees in the Unit receive wage increases? [245]
Yes.

Q. Could you tell us the amount or the average amount of these increases?

A. Will it suffice to give examples?

Q. Examples, yes. A. We had——

Mr. Weil: May I see the documents to which the witness is referring?

Trial Examiner: Are you trying to refresh your recollection here?

The Witness: I just have some work sheets of my own.

Trial Examiner: Don't refer to anything unless counsel draws your attention to it.

The Witness: All right.

A. In the case of—may I point out two examples—in the case of the two witnesses who are employees of Intermountain Equipment, prior to negotiations each of them were receiving an hourly

(Testimony of Philip A. Dufford.)

wage rate of \$1.24. After the contract was negotiated, the classification in which they were placed, bearing in mind that we had some new classifications after that to fit Union terminology, these fellows were each increased to \$1.50, which is a twenty-six-cent-per-hour increase.

At that time, we had a varying schedule of hourly rates for the people who later became identified with this unit. At the time, I believe there were two employees who had a base rate of [246] \$1.10, some who had a rate of \$1.14, some who had a rate of \$1.24. And those rates had been changed over a period of time to where we had several rates within what became the bargaining unit, prior to the contract.

Trial Examiner: Did they get proportionate raises, then?

The Witness: Yes. I might explain in that contract which you observed there are two breaks in classification. I believe one has a five, and the other has four types of classifications. Everyone remaining in that unit was given increases commensurate with the finally-agreed wage increases.

Q. (By Mr. Smith): As a result of the negotiations in 1953 and the 1953 contract, did the employees in the unit receive other benefits? Would you describe such other benefits as they might have received?

Trial Examiner: Just a minute. You mean, just what does the contract contain, is that your question?

(Testimony of Philip A. Dufford.)

Mr. Smith: Well——

Trial Examiner: The contract, of course, would show what the benefits are.

Q. (By Mr. Smith): Do you have any estimate from the standpoint of money value or the equivalent of wages what other benefits the employees in the unit might have received as a result of these negotiations?

Trial Examiner: Do you understand the question?

The Witness: I think so. [247]

Trial Examiner: I understand what you mean is what was the monetary value of fringe benefits other than just wage increases.

Mr. Smith: Yes.

The Witness: Right.

Trial Examiner: Which they received, which they were not receiving before.

A. As I understand it, which—written into the contract, as specified, were stipulated cost items to the Company, which, of course, were not a part of any written agreement we had before because we had no written agreement. And these items included stipulated paid holidays, specified vacations, wage increases. Using the 40-hour week as a basis for computing the specified additional cost to the Company, the items that were then in the contract would show an increased cost over the old wage rate of amounts, per individual, in excess of \$500 per year.

Q. (By Mr. Smith): Were employees of Inter-

(Testimony of Philip A. Dufford.)

mountain, other than those in the bargaining unit, guaranteed such fringe benefits as you have described? A. No.

Q. Does the 1953-54 contract contain provision for paid holidays?

Trial Examiner: It's in evidence. If you want to ask what the practice was before, that might be helpful as to whether or not paid holidays were given.

Q. (By Mr. Smith): Were paid holidays previously given employees [248] in the unit?

A. It was purely an optional matter. They had been, some, at times. It was not by a pre-determined setup or standard.

Q. Prior to 1953, that contract, if a man worked on a holiday, what pay would he have received?

A. Well, it would depend a good deal on the man, his qualification, whatever he was doing.

Q. Say, in the bargaining unit?

A. We paid any of the individuals in our parts department at the rate of time and a half for overtime when we worked them overtime.

Q. Did you pay them a day's pay in addition?

A. That I would have to check on. I am not familiar enough with that detail to be able to tell you right now.

Q. Under the 1953 contract, if a man worked on a holiday, what would you pay him?

A. I believe it calls for time and a half. That is in the exhibit, but we would follow the terms of the contract exactly.

(Testimony of Philip A. Dufford.)

Q. Would he receive payment for the paid holiday in addition to the time and a half for working that day?

A. Well, yes, I think so. That is covered by the contract, and I think that is true.

Q. Employees outside the bargain unit, are they paid for working on holidays?

A. Not necessarily. There is no obligation to do it. Many of [249] employees do work odd hours and on holidays, depending on work load, and they are not always accorded additional compensation.

Q. Did employees outside the bargain unit receive proportionate wage increases with those inside the bargain unit during the years 1953 and 1954?

A. There was no concerted practice in that respect. I assume that during that time there may have been occasional wage revisions outside the unit. However, there was nothing done as a result of the contract at that time.

Trial Examiner: May I clarify that?

I would like to know what you mean by there were wage revisions. Do you mean merit increases or do you mean a general wage or a basic wage increase, Mr. Dufford?

The Witness: Anything that would occur to employees outside the unit would be a merit increase. What I mean—may I—

Trial Examiner: Go ahead and explain it.

The Witness: I think what Mr. Smith asked me was, there, as a result of going into this bargain conference and arriving at a contract, did we turn

(Testimony of Philip A. Dufford.)

around and make blanket increases throughout the rest of the employees. We did not.

Q. (By Mr. Smith): Mr. Dufford, are you familiar with the terms of the 1953-54 contract?

A. Yes.

Q. It is in evidence here at this time. At any time has any employee or any group of employees made a claim for wages under [250] that contract?

A. No.

Q. Has, at any time, the grievance machinery set out in Article XII of the contract been utilized?

A. No.

Q. Have you ever had a request for the grievance machinery in Article XII to be utilized?

A. No.

Q. Have you ever received a written request for payment of wages under Article VI of the contract?

A. No.

Mr. Weil: I assume my continuing line of objection to that line of testimony still stands?

Trial Examiner: You may have a continuing objection, yes.

Q. (By Mr. Smith): Mr. Dufford, did you enter into negotiations with the Union sometime in July, 1954, for a 1954-55 contract? A. Yes.

Q. Were bonuses and sick leave discussed at these negotiations? A. Yes.

Q. What disposition was made of bonus and sick leave at these negotiations?

A. A sick leave clause is incorporated in our

(Testimony of Philip A. Dufford.)

1954 contract, but there is nothing pertaining to bonus in there.

Q. Can you recall any conversations regarding bonus during these negotiations? [251]

A. I can recall many conversations. They were similar to the ones we had in 1953.

Q. Will you state the substance of such conversations?

A. The substance was that we still considered the payment of bonuses, the matter of the payment of bonuses and the other factors pertaining to bonuses to be matters of management judgment and consideration.

* * *

Cross-Examination

By Mr. Weil:

Q. You have testified that rates of pay [252] prior to the 1953 agreement ranged from \$1.10 to \$1.24. Is that the complete range?

A. I think not. I would have to consult the record to be able to tell you the complete range and all the rates. I know that those rates were incorporated in there.

Q. Do you know whether the majority of the rates were within those limits?

A. To the best of my knowledge, they were.

Q. Do you know whether there were any rates over \$1.24?

A. I don't know that positively right now, no.

(Testimony of Philip A. Dufford.)

Q. And do you know whether there were any under \$1.10?

A. I am virtually certain there were none under \$1.10.

Q. So there might have been some over \$1.24, is that correct?

A. It's possible because—I could give you that answer if you want me to consult the record.

Q. You state that you estimate the money value of the fringe benefits in the contract, or the other benefits, at \$500 per annum, is that correct?

A. I said in excess of \$500.

Q. Can you break that down?

A. Well, I would have to pick an example. Assuming that an employee was paid \$1.24, and assuming that his new rate is \$1.50, on a 40-hour week basis, 40 times \$1.24 is—whatever it is.

Mr. Neilson: \$49.60.

A. Forty times \$1.50 is sixty or a difference of \$10.40, and [253] over 52 weeks in the year, that gives you obviously over \$500.

Q. (By Mr. Weil): Were there any other benefits that cost the Company anything?

A. Every item is something that is stipulated that must be paid, and as written in the contract, part of the cost item, therefore, paid holidays are a cost item; vacations are a cost item.

Q. But did any of these other benefits result in an increased cost to the employer?

A. That I don't know. They are, however, stipulated as things we must pay.

(Testimony of Philip A. Dufford.)

Q. Nevertheless, the question is whether they resulted in an increased cost, and your answer is you don't know? A. That is right.

Q. And, as far as you know, the only increased cost of the employer that you know is that of wages, is that so?

A. I don't think that is true. They are potential items of cost whether or not in practice, which are not; they are stipulated items below which you can't go. In the absence of an agreement, we have a two-way street. This is a one-way street in this one, and those items of cost, whether or not they would result in additional cost in a given year, they are positively items of cost in that way.

Q. Yes, I know, but we are not talking about potentials. We are talking about actualities.

A. Maybe you and I are talking about different things. [254]

Q. This could be. Now, let's talk about what I am talking about, actual costs. As far as you know, were there any other increased costs than the increased cost of wages for the people in the unit?

A. I don't know.

Q. Prior to the execution of the 1953 contract, did your employees receive, or did your employees work on all the holidays? A. Well——

Q. Let me break that down. Did they work on Christmas?

A. No, I don't think so. Maybe some of them did; I don't think so. It isn't customary to work on Christmas.

(Testimony of Philip A. Dufford.)

Q. Was it customary for your employees to work on New Year's Day?

A. That was—most offices are closed on New Year's Day, so ours was closed, also.

Q. Is it customary for your employees to work on the Fourth of July? A. No, absolutely not.

Q. Labor Day?

A. Any holiday, any employee may have had work to do and may have done it.

Q. But was it customary?

A. What we are talking about is places of business are generally considered closed on legal holidays.

Q. I am referring to your place of [255] business.

A. Our place of business was closed. That does not mean that employees could not work and didn't work on some holidays.

Q. Yes, I understand, but I am referring to the custom. It was customary, your place of business was closed on those holidays, is that correct?

A. Certainly, if it is a legal holiday.

Q. How about Memorial Day, was your place of business closed on that day, also?

A. It is a legal holiday. Our business was closed.

Q. And Thanksgiving Day, also?

A. It was a legal holiday: our business was closed then.

Q. When employees worked, prior to 1953, on those holidays, were they paid just straight time?

A. That would depend on the employee and

(Testimony of Philip A. Dufford.)

what classification or which group of employees worked. Some of them undoubtedly worked on holidays and received no additional compensation. Others were paid when they worked under such conditions.

Q. The employees who worked, the employees who are presently in the unit, prior to 1953, if they had been asked to work prior to 1953 on a holiday, if you had an order to get out or get in, would you have paid them straight time?

A. Possibly we would have paid them time and a half. We paid them time and a half for overtime.

Q. Prior to the execution of the 1953 contract, did any of your employees receive any [256] vacations? A. Yes.

Q. Was there a Company policy regarding vacations?

A. There wasn't any specified, set policy. We operated in that as we did most other things, in a very loose manner.

Q. Then, I assume, that there was a custom, is that so?

A. I find it hard to stick to our terminology "custom." We tried to be as lenient as we could with employees, and when conditions permitted, we tried to let them have some time off. There have been times when it was impossible to get a vacation scheduled when we were busy enough to need all hands on deck.

Q. Ordinarily, aside from times which were, during which you were excessively busy, could an

(Testimony of Philip A. Dufford.)

employee consider that he would get a vacation each year?

A. That was a matter handled, as some other matters, principally, between the employees individually and the supervisor of the department.

* * *

Trial Examiner: I think what the question calls for, Mr. Dufford, is on the basis of probabilities. Would an employee [257] be justified in expecting that he might get a vacation each year?

A. He could ask his supervisor for one and, because of that, if he had some time off before and took it up with his supervisor and the time and conditions would permit, he would probably be given consideration again. He would probably get it again.

Q. (By Mr. Weil): Would the employee be able to expect that he would get a vacation?

A. Well, what the employee expected or not, I—

Q. Did the employee get a vacation when he asked for it each year, the usual employee, the average employee?

A. I would say generally so.

Q. Generally he did?

A. Yes.

Q. How much of a vacation?

A. Those have varied.

Q. Yes, I know. But how much of a vacation would the average employee expect to get, a year? Apparently some employees didn't get any. Apparently there may have been employees who got more.

(Testimony of Philip A. Dufford.)

But I assume the usual employee got a usual vacation, isn't that so? A. I don't think so.

Q. You don't think so? A. No.

Q. Did you hear either Mr. Buntin or Mr. Stewart testify that he received a week's vacation each year? [258]

* * *

A. I don't remember the exact testimony. I remember that both boys testified as to things they had received in the past prior to the Union contract, and certainly I am familiar with the fact that they have had some vacation time.

Q. (By Mr. Weil): It's true, isn't it, that barring extraordinary circumstances, your employees have received a week's vacation each year?

* * *

A. What I said, the fellows down there were in the habit of asking for time off to go hunting for two or three days or to do something else, and those times, if such permission was granted, [259] could vary considerably.

Trial Examiner: Would that not have been in addition to a summer vacation or were they always given time off for short periods throughout the year?

The Witness: That was handled between the men and their supervisors, but it was definitely my understanding that quite frequently they might ask for a day or two off for one reason or another, and,

(Testimony of Philip A. Dufford.)

additionally, they would ask for vacations. They didn't ask me every time this occurred.

Trial Examiner: If I may interrupt just a minute. Talking about time off—I assume I am grounded in that assumption—you are talking about compensated time off, are you? In other words, a paid vacation?

(The witness nods his head affirmatively.)

Trial Examiner: I was just wondering whether time off was paid; it if was a paid vacation or whether it was just time off to go hunting.

The Witness: I think for the most part they were paid for time off although I wouldn't be surprised to find that they were not paid for all their time off. I don't know. I don't know that.

Trial Examiner: Insofar as they got a vacation in the warm period, or a summer period, they were paid, then?

The Witness: That is right.

Q. (By Mr. Weil): You still haven't answered my question. I [260] will rephrase it. Is it or is it not true that customarily, barring abnormal circumstances, an employee received a week's paid vacation each year, the usual employee?

Trial Examiner: In the unit?

Q. (By Mr. Weil): In the unit. All the employees, as a matter of fact.

A. I don't know that positively.

Q. You don't know?

A. There are many things that I look up when

(Testimony of Philip A. Dufford.)

I have to have occasion to find them, that I probably rely on; on things other than my memory.

Q. You don't know that your employees got a week's vacation?

A. I know that it was customary that most of them got a vacation.

Q. You don't know the length of that vacation?

A. Not specifically.

Q. You don't know the customary length of that vacation?

* * *

A. The length has varied.

Q. (By Mr. Weil): Was there a customary length? By that I mean, did most of your employees receive a vacation of a certain length?

A. Of varying lengths. I can't lump them all into one [261] category. I don't know how to do that.

Q. On those employees who were presently in the unit, those employees whose classifications are presently in the unit, did those employees customarily receive a vacation of definite length? Customarily, not invariably, but customarily, that is.

A. Well, customarily they received a vacation, and I assume that it was approximately the same length for each one of them.

Q. Can you tell me what that approximate length was?

A. I have already tried to answer that as well as I know.

Q. Will you answer it now?

(Testimony of Philip A. Dufford.)

A. That it could vary from——

Q. I know it could, but did it?

A. From a few days——

Q. But did it? A. That I don't know.

Trial Examiner: May I ask one question here?

Mr. Weil: Certainly.

Trial Examiner: Excluding office workers, was it the practice to treat all of the other employees approximately on the same basis so far as vacations were concerned?

The Witness: Well, you would have to exclude a lot of people in there, salesmen and various other categories, too, other than office workers. I am saying people in the same category will be treated in the same way, working on adjacent jobs or in the same department, they would undoubtedly be treated in [262] a similar fashion because each of them operated under one supervisor.

Trial Examiner: And employees in the shop, would they have been given approximately the same treatment, so far as vacations are concerned, as people in the tool room?

The Witness: Well, I assume they would. That, again, is a matter of supervisory decision.

Trial Examiner: I would like to ask one more question, also.

Had anyone given the supervisors or the department heads any statement of Company policy with respect to how much paid vacation they could give to the employees?

(Testimony of Philip A. Dufford.)

The Witness: I didn't. I don't think anyone else did.

Trial Examiner: They could give a month's vacation, then, if they saw fit?

The Witness: If they felt a justification for it, I suppose they could. At least there was nothing contrary to it. It would be highly unusual, I suppose.

Q. (By Mr. Weil): Would it be necessary or was it, I should say, necessary prior to the signing of the 1953 contract for the supervisors to check with you before granting a request for a vacation?

A. My only stipulations with supervisors was that if they were going to have people in their department off for any reason at all, that they would try to chart the work load so that the work [263] would go on. And to that extent, when any plans were made, I was apprised of them.

Q. Then you were actually apprised of each vacation that was granted, is that so?

A. I probably was; probably so. If I wanted to refer to any arrangements of that kind. Usually I didn't pay much attention to them, relying on the supervisors to handle such things.

Q. Prior to the 1953 contract, was overtime compensated by any more than ordinary time?

A. Oh, yes.

Q. On what basis?

A. Time and a half. We were governed by other wage regulations, I believe, Wage and Hour Laws and Regulations.

(Testimony of Philip A. Dufford.)

Q. After the 1953 contract was signed, did your other employees—this is using “your employees” under the terms of the Act, of course—than those in the unit receive any raises in pay?

A. There are always changes in schedule in any place where you are trying to run a business, and certainly from time to time, there are changes in pay rates, but I don't know specifically of any right at that time. I am sure there have been changes during the year 1954, '53-'54.

Q. Was there any blanket-paid increase?

A. Not that I am familiar with. For the rest of the employees you mean, outside the unit?

Q. Yes. [264] A. No.

Q. Mr. Dufford, during the negotiations, there has been considerable testimony from you and from other witnesses as to the position of the Company in its willingness to bargain about anything at any time. Has this always been the case?

A. To the best of my knowledge.

* * *

Q. (By Mr. Weil): Prior to the signing of the 1953 contract, is it true that most of the employees worked on the basis of a 47-hour week?

* * *

A. That is true, I think, generally speaking.

Q. (By Mr. Weil): Since the 1953 contract was signed, is it [265] true that most of the employees work a 40-hour week? A. Correct.

(Testimony of Philip A. Dufford.)

Trial Examiner: You mean in the unit or in and out?

Mr. Weil: I meant in the unit.

Trial Examiner: Did you so understand it?

The Witness: I didn't understand that, but it's clarified.

Q. (By Mr. Weil): Let's clarify it further by saying the employees outside the unit, were they cut to 40 hours, too?

A. There was no stipulated cut in their time. The unit was on a 40-hour basis, and certainly the employees had no restrictions on hours—I mean, because they come down and work whenever they have work to do.

Q. I am afraid I don't quite understand your answer. Is it customary now that most of the employees outside of the unit work 40 hours or more?

A. Outside of the unit we have many employees who work, who put in over 50 hours a week. We have no—talking about the people in the unit, we are on a 40-hour basis as a base week. Actually, we were always on a base 40-hour week although we had been working some hours of overtime.

Q. Do I understand——

Trial Examiner: I just wanted to get that straight.

Do you mean that the seven hours above forty always has been overtime?

The Witness: That is right. [266]

Trial Examiner: It was merely that previously

(Testimony of Philip A. Dufford.)

they used to work seven hours on Saturday whereas now they only work through Friday?

The Witness: No, that wasn't quite correct. If I may explain that——

Trial Examiner: I wish you would, yes.

The Witness: Well, we had a work week set up wherein, I believe, that there were four hours, it was three or four hours on Saturday and a half-hour every day because of keeping open a little longer, and——

Trial Examiner: It was an eight and a half hour day, Monday to Friday?

The Witness: Yes. I am just trying to figure out how it came to seven, but I think that's it. I think it was a half-hour every day, every week day, and then Saturday morning.

Q. (By Mr. Neilson): It would actually be 47 and a half hours?

A. For individuals, it may have varied more than that. That is correct. If somebody worked a half-hour under or a half-hour over, it was just as he said, the general period of the work week would amount to 47 hours every week, and we paid seven hours overtime.

Q. (By Mr. Weil): Is the general work period now for all employees about the same?

A. Not for all employees.

Q. Is there a difference between those in the unit and those [267] out of the unit?

A. Those in the unit are on—that's a hard one there. Many people, there are many people outside

(Testimony of Philip A. Dufford.)

the unit who may work more or less than 40 hours. Those in the unit, generally speaking, now, work a 40-hour week. Many of the other employees work a 40-hour week, also.

Q. What determines the amount of work a week, the amount of the work load, or the hours of the shop?

A. Generally speaking, we have many jobs, quite a few outside the unit, that are not routine jobs.

Q. I assume by that that you mean that some people have nonrouting jobs that fluctuate so that they work more and less, is that it?

A. It could be.

Q. But is it? A. Yes, it is.

Q. Would you say that most of the employees outside the unit work over 40 hours a week?

A. I wouldn't say that.

Q. I know, but could you? Would it be true if you did? A. I don't know.

Mr. Weil: That is all.

Q. (By Mr. Neilson): You paid bonuses to substantially all your employees in '50, '51, and '52?

A. Yes. [268]

Q. Did you pay bonuses to substantially all your employees except those in the bargain unit in 1953?

A. Isn't that already in the testimony?

Q. I want a yes or no answer. A. Yes.

Q. Now, when did you decrease the number of hours for employees in the unit from 47 and a half hours to 40?

(Testimony of Philip A. Dufford.)

A. I don't know the exact date. It was sometime approximately a year ago.

Q. Was it near the time of the signing of the '53 contract? A. It was sometime after that.

Q. Was it—by "sometime," could you give us an approximation of the time? A. I don't know.

Q. Would it be a month, two months?

A. I don't know.

* * *

Q. (By Mr. Neilson): Was it approximately the time that the time clock was installed?

A. That I don't know, although I would assume that it would be. [269]

Q. And do you have any recollection as to when the time clock, as a matter of comparison, was installed?

A. No. It wasn't—I couldn't tell you the exact date.

Q. Now, you testified that there was approximately a \$500 per employee per year increase by the signing of the new contract. Is that right?

A. I didn't say that.

Q. What did you say?

A. I said that based on the 40-hour week, the difference in pay amounted to that amount.

Q. And that was using the comparison of \$1.24 to \$1.50, is that correct? A. Correct.

Q. Actually, in cost to the Company, was there any increase in cost per employee by the granting of this increase from \$1.24 to \$1.50 under this contract?

A. I don't know.

(Testimony of Philip A. Dufford.)

Q. You don't know?

A. My figures will disclose that.

Q. All right, then, let's take the figures. These employees were dropped from 47 and a half to 40 hours, were they not? A. No.

Q. Weren't their hours cut from 47 and a half to 40?

A. I don't think that was 47 and a half anyhow. First I started out with 47. I don't know where the 47 and a half came [270] from.

Q. I was using your own computation.

A. I didn't say 47 and a half.

Q. You said they worked half an hour each day, five days of the week, four hours on——

Trial Examiner: That would be six and a half hours.

A. You aren't going to get me mixed up on these things. I didn't sit there and count the hours. I said 47 was about right.

Q. All right. Let's use your figure 47, then. They were cut from 47 hours to 40, were they not?

A. They weren't cut. We went on a 40-hour week.

Q. What else were they if they weren't cut? They didn't work 47 hours, did they?

A. They received more money for their hours.

Q. They were cut from 47 to 40 hours per week, were they not?

A. They were not cut. We went on a 40-hour week.

Q. Answer my question yes or no.

(Testimony of Philip A. Dufford.)

Trial Examiner: Just a minute, now. There is a difference in terminology. Let's see if I understand the question. Are you asking whether or not the standard work week was reduced from 47 to 40?

Mr. Nielson: That is exactly what I am asking.

A. That is right.

Q. (By Mr. Nielson): Cut?

A. Not cut, but the work week was reduced. [271]

Q. What's the difference—cut, it's a squabble over terminology. Prior to signing this contract, these employees were paid time and a half for overtime, were they not? A. Yes.

Q. Time and a half for each hour worked overtime at \$1.24 per hour would be how much? Or let me ask it this way—

A. If you want me to figure it out—

Q. Would it be correct, it's \$1.86?

Trial Examiner: \$1.86, yes.

A. Whatever it amounted to.

Q. Would those employees in overtime that week earn approximately \$13 per week overtime?

A. If that is the way it figured out.

Q. And in 26 weeks—or let me ask it this way, I think you have testified that there would be, at 40 hours per week, 40 hours a week at \$1.24 would be \$49.60?

A. If that is the correct figure; that is a matter of multiplication.

Trial Examiner: The witness isn't required to do that.

Mr. Nielson: He testified to that before.

(Testimony of Philip A. Dufford.)

The Witness: If it's a matter of multiplication——

Q. (By Mr. Nielson): Actually, weren't these employees on a cost-basis, take-home pay being reduced in wages by the loss of the overtime?

A. This matter of wages was discussed in collective bargaining—— [272]

Q. Answer my question.

Trial Examiner: It seems to me that is calling for a conclusion. In other words, it's something that I could figure out for myself on a comparative basis from the figures I have.

Mr. Smith: There are certainly different bases from which to figure that out.

Trial Examiner: Yes. If I understand counsel's position, it is that employees now on a 40-hour week, get no more and might get less than they formerly got on a 47-hour week.

Mr. Nielson: That is correct.

Trial Examiner: I can figure that out.

Mr. Nielson: It's a computation.

Q. (By Mr. Nielson): And that decrease in the hours went into effect shortly after the contract was signed? A. Yes.

Q. On vacations you testified several times that there was no set policy. Was there any limitation established by the Company as to what an employee could receive as a vacation in a given year?

A. No.

Q. Then, it was more or less a loose arrangement between the employee and his supervisor?

(Testimony of Philip A. Dufford.)

A. Correct.

Q. Was there any limitation on the amount of time that the employee worked there before he could qualify for any given period [273] or any standard such as that?

A. I think that there was a general understanding that a year's time constituted——

Q. The minimum time?

A. Yes, I would say so. That is a little bit a mute question, but I think that is generally true.

Q. Well, let me ask you this, would you generally have a policy of—this is a little bit hypothetical—of employee “A” working there one year, he would be entitled to, say, a week's vacation; after three years, two weeks; fifteen years, three weeks, or would you have any standard such as that?

A. No.

Q. In other words, your vacation, then, was pretty much wide open and broad prior to the time of the signing of the contract?

A. It was a very loose arrangement, yes.

Q. Would this be a correct statement in reference to bonuses, that you paid substantially all your employees a bonus for several years prior to 1950? [274]

* * *

A. How far back do we go on this question?

Q. (By Mr. Nielson): For several years, prior to 1950. A. We have in some years——

Q. (Interrupting): Can you answer the question “yes” or “no,” may I ask you that?

(Testimony of Philip A. Dufford.)

A. I would have to go back into the records to find out.

Mr. Smith: I renew my objection to the additional questions inasmuch as counsel has stipulated to the year 1950, '51, and '52.

Trial Examiner: Yes?

Mr. Smith: Inasmuch as there is no allegation in the complaint, going back and covering these years, and inasmuch as there has been no testimony covering these years, you have had your opportunity with Mr. Dufford as an adverse witness.

Trial Examiner: Your objection is that this isn't proper recross-examination?

Mr. Nielson: I can see that it is proper recross-examination. He testified concerning bonuses.

Trial Examiner: Not during that period.

Mr. Smith: During the years, '50, '51, and '52. [275]

Mr. Nielson: He testified as to bonuses being paid for a period of years.

Mr. Smith: '50, '51, and a '52.

Trial Examiner: I think you are talking about the stipulation, that is, that bonuses were paid for several years without regard to particular years. Was it your purpose now just to determine what was meant by "several"?

Mr. Nielson: To find out if it was a continuing policy.

Trial Examiner: Insofar as the witness is able to say from his own knowledge, I will permit him to

(Testimony of Philip A. Dufford.)

answer as to whether or not the practice antedated 1950.

A. I think it antedated 1950, but I can't tell you how far.

Q. (By Mr. Nielson): Would it be an incorrect statement to say for a period of several years or a limited few years or—would there be any generality that you could use?

A. I would rather not make a generality when you ask a question like that. I could find out.

Q. But it did antedate 1950?

A. It antedated 1950.

Q. But you say that the other employees of the Company, outside of the unit, did or did not receive a blanket increase at the time of signing the 1953 contract? A. Yes, I would say they did not.

Q. They did not? A. That is right. [276]

* * *

Trial Examiner: If you feel there is something material, mention it to me, and I will decide whether or not it should go in the record.

The Witness: Well, what I think is not in the record, that I believe should be in the record, is that—it's in our answer to the complaint, however—that I most vigorously deny the existence of any oral agreement. Isn't that something like what you were saying isn't in here?

Trial Examiner: Something, yes, but the point is, whether or not there is an oral agreement, that depends not merely on a person's own state of mind,

(Testimony of Philip A. Dufford.)

but also upon what the several parties in that negotiating meeting may have said whether they intended to say it or not. And it's for that reason that I want to find out just what was said.

Now, specifically, I believe, you were quoted as making the statement that if bonuses were paid to any employees, they would be paid to all. Do you recall having made such a statement as that?

The Witness: I did not make such a statement. [278]

* * *

Mr. Nielson: May we have a continuing objection to the entire line of questioning?

Trial Examiner: Yes, you may.

I wanted to find out whether or not some statement was made, [279] Mr. Dufford, in one of those negotiating meetings which you think might have given the witnesses for the General Counsel the idea that such an understanding was made.

* * *

Trial Examiner: I am asking you whether any statement was made, if not in the words which I previously stated, in some other terminology which related to that general substance. Do you see what I mean?

Mr. Nielson: I have no objection to the rephrased question.

The Witness: Well, I think I do. I could recall the substance of the conversation. I couldn't repeat it word for word.

(Testimony of Philip A. Dufford.)

Trial Examiner: I would like to have you give the substance.

The Witness: I don't believe that at any time during our negotiations did I say anything which could be misconstrued to that extent. Had I been willing to make such a statement I would have been willing to put it in writing or make such an agreement.

Trial Examiner: Well, the point is that you wanted to keep bonuses within the management prerogative?

The Witness: That was. I had no choice. That is the way that we do it.

Trial Examiner: You have also been quoted, I believe, as [280] saying that you did not intend any discrimination against the Union employees or words to that general effect.

The Witness: That is right.

Trial Examiner: How did that come into the conversation?

The Witness: I don't recall the use of the terminology "discrimination" in there in our discussion at all on that subject.

Trial Examiner: You mean on the subject of bonuses?

The Witness: That is right.

Trial Examiner: Do you think it came in somewhere else?

The Witness: I think that probably the word at some time during our negotiations was discussed, but as applied to that particular thing, I certainly

(Testimony of Philip A. Dufford.)

don't recall its ever having been gone into during the discussion.

Trial Examiner: That is the expression of discrimination?

The Witness: Discrimination, yes. In other words, I may be getting far afield as a witness, but it was testified that the conversation leading up to negotiations which resulted in the contract, that Mr. Baldwin said, "Well, if you paid somebody a bonus and don't pay us a bonus, we will consider it discrimination" or words to that effect. I don't think there was any conversations of that kind in our negotiations.

Trial Examiner: Read the third question and answer back.

(Question read.)

Trial Examiner: Referring to the question and answer I just [281] read, I am not sure that you meant that is right that such testimony was given or that is right that you said it. Now, can you clarify that?

The Witness: There was no intended discrimination.

Trial Examiner: But you don't recall having said it?

The Witness: Having said that there wasn't?

Trial Examiner: That there would be none?

The Witness: Well, I guess I will have to go clear back now, again, because I am a little lost there. There was never any intent to discriminate.

(Testimony of Philip A. Dufford.)

Trial Examiner: I am talking about expressed words used in negotiating meetings. When you told me in response to my question there, "That is right," did you mean——

The Witness (Interrupting): I think what you asked me was—I had better have you repeat that question so I will know what you asked me.

Trial Examiner: Read it again.

(Question reread.)

The Witness: Yes, I said that, I think.

Trial Examiner: That is right, you did say it?

The Witness: Possibly not those words, but that meaning.

Trial Examiner: All right, then, if you did say it, do you recall at what stage of the negotiations you said it?

The Witness: It could be all through them, at any stage.

Trial Examiner: You don't recall specific conversations, [282] then, in the negotiating meetings, where you actually included that?

The Witness: No, I don't recall any specific stage. There was a good deal of conversation during all this negotiating.

* * *

Q. (By Mr. Nielson): You said you did not intend to discriminate, or didn't intend any discrimination, against the employees. Now, are you saying that you said that in the conversation or that was your statement of mind?

(Testimony of Philip A. Dufford.)

A. I cannot remember exact conversations back that far. I know that——

Q. (Interrupting): Now, coming back to this again, when you say you did not intend to discriminate against these employees [283] because of their having joined the Union, I assume. Are you saying that was what was said in the negotiations or was that your state of mind?

A. You can call it a state of mind if you want to. I know that on several occasions I was asked questions that purported to inquire into that, and I answered that there was no discrimination intended.

Q. Then, you would say that actually it would be both? You made the statement in negotiations, and it also was a state of mind that you did not intend to discriminate against the employees? Would that be a correct statement?

A. I think that would be a correct statement. I——

Mr. Nielson (Interrupting): That is all I have.

Mr. Weil: I think my memory serves me correctly, but I think I had better ask the witness, if I may.

Q. (By Mr. Weil): What exactly did you say about bonuses, if you recall?

A. That we had no set policy regarding bonuses, that it was strictly the prerogative of management, that we had always handled it that way, and that we had no written bonus arrangement with any employee, and had never had such an arrangement.

(Testimony of Philip A. Dufford.)

Q. Is that all that you said about bonuses or is that all you can recall?

A. I suppose it was all I said. It's specifically the essence of what I said. You can't talk for four or five days on these [284] subjects without many, many words. I don't recall all the words that anyone used.

Mr. Weil: That is all.

Trial Examiner: I have one other question, and I don't know whether this will be subject to your continuing objection or not, Mr. Nielson.

Who was the person or persons who decided who should receive bonuses and how much?

The Witness: Well, that—do you want me to explain some of the mechanics of that sort of thing?

Trial Examiner: Yes, if you will.

The Witness: Ordinarily, we would ask first—

Trial Examiner: Who is we?

The Witness: Well, I would, would ask the supervisors of the department, who was closer to their own men, to his own men, to give me his impression of the work and ability and the attitude and so forth of his employees. And after that time, I had opinions on the matter, I discussed the matter with each one of the supervisors, and then I usually—well, or always, I would say—consulted with Mr. Swenson, who was president of our Company, for his agreement or approval of any agreement that I might make, or any recommendations that I might make. There were several places along the line where this

(Testimony of Philip A. Dufford.)

could be changed by an agreement between two or three parties.

Trial Examiner: Well, whose decision was it in 1953, not [285] to give bonuses to those in the unit?

The Witness: Not to? I would say that was a decision arrived at between Mr. Swenson and myself. We wanted to live up to our contract. We didn't want to violate the contract in any way.

Trial Examiner: Well, when was the decision made?

The Witness: Well, probably sometime during the month of December. We may, at that same time of making decisions, we may have made it, which could be made regarding any employee, toward the end of the year. That is about as close as I can nail that.

* * *

Trial Examiner: From your answer, I think probably the question I had in mind has been inferentially answered. However, I will ask it specifically. Why were the employees in the unit not included in the bonuses that were given in 1953?

The Witness: Because we had a contract of employment with those people by which we guaranteed and had to live by the contract, which bound us to certain terms with those people, such specific binding agreement not existing with the other people, and by the terms of which contract, we could incur considerable expense. Also due to the fact that there was a possibility that payment of a bonus could, under certain sets of circumstances [286] become a

(Testimony of Philip A. Dufford.)

violation of our contract or a violation of the—wait just a minute—that unfair labor charges could be filed against us for conceivably could be filed for payment of a bonus.

Trial Examiner: You mean without taking it up with the Union first?

The Witness: That is true. There were many things there that—— [287]

* * *

ALVIN M. STEWART

a witness called by and on behalf of the Union, having been previously sworn, was examined and testified further as follows:

Direct Examination

By Mr. Nielson:

Q. You are the same Stewart who has been previously sworn and testified in this matter?

A. Yes, sir.

Q. You are an employee of Intermountain Equipment Company, are you not?

A. Yes, sir.

Q. Who is your supervisor there?

A. Mr. Jess Kight.

Q. And I think testimony has been elicited heretofore that he is manager or supervisor of the parts department? A. Parts manager.

Q. During that time that you have been employed there, has Mr. Kight been in that same position? A. Yes.

Q. Do you recall an instance of a meeting of the

(Testimony of Alvin M. Stewart.)

employees of [290] the parts department, wherein Mr. Kight addressed them?

A. Yes. We had several meetings, parts department meetings.

* * *

Q. (By Mr. Nielson): I asked you if you recalled a meeting in which Mr. Kight addressed the employees with reference to unionization of the employees? A. Yes, there was a meeting.

Q. Do you remember when it was?

A. Well, sir, the exact date, I can't. It was just shortly after I was employed. I would say the month of February or March of '52. It was just a month and a half to two months after I was employed. [291]

Q. Do you remember who was there or—let me ask you this way. Do you remember how many employees were there, of the parts department?

A. Well, at the time of the meeting, all parts department employees who was working there that day was at the meeting.

Q. Was that held on the company's premises, on company time?

A. Yes, in the parts department offices.

Q. Do you remember what Mr. Kight said, or the substance of what Mr. Kight said in reference to sick leave, bonuses, and other privileges that the employees had, in the event they should join the Union?

A. Well, the gist of it, if I understood his meaning, I was a new employee and did not know too much about what the meeting was brought about

(Testimony of Alvin M. Stewart.)

about, but the gist of the meeting was that he described to the employees what privileges would be taken away from them if they had entered into a contract with the Union.

Q. Did he specifically mention what privileges would be denied them?

A. Well, I remember one, that they would be denied the privilege of going uptown, which special privilege they enjoyed, to cash their checks and various things, such as doctor appointments, that there would be a time clock——

* * *

Received October 11, 1954. [292]

In the United States Court of Appeals
for the Ninth Circuit

No. 15035

INTERMOUNTAIN EQUIPMENT CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Rela-

tions Board—Series 6, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, “Intermountain Equipment Company and General Teamsters, Warehousemen and Helpers Local Union 483,” the same being known as Case No. 19-CA-948 before said Board, such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Stenographic transcript of testimony taken before Trial Examiner James R. Hemingway on September 28, 29, and October 1, 1954, together with exhibits introduced in evidence.

(2) Copy of Trial Examiner's Order Correcting Transcript of Testimony, dated December 6, 1954, together with affidavit of service and United States Post Office return receipts thereof.

(3) Copy of Trial Examiner's Intermediate Report and Recommended Order dated December 8, 1954; Order transferring case to the Board, dated December 8, 1954, together with affidavit of service and United States Post Office return receipts thereof.

(4) Petitioner's¹ exceptions to Intermediate Re-

¹Respondent before the Board.

port and Recommended Order, dated January 7, 1955.

(5) Petitioner's motion for order permitting oral argument, dated January 7, 1955 (Denied, see Board's Decision and Order, dated December 16, 1955).

(6) Copy of Decision and Order issued by the National Labor Relations Board on December 16, 1955, together with affidavit of service and United States Post Office return receipts thereof.

(7) Petitioner's motion for reconsideration and request for oral argument, dated January 16, 1956.

(8) Copy of Board's order denying motion for reconsideration and request for oral argument, dated January 26, 1956, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 23rd day of March, 1956.

/s/ FRANK M. KLEILER,
Executive Secretary.

[Seal]

NATIONAL LABOR
RELATIONS BOARD.

[Endorsed]: No. 15035. United States Court of Appeals for the Ninth Circuit. Intermountain Equipment Company, Petitioner, vs. National Labor Relations Board, Respondent. Transcript of Record. Petition for Review and Petition for Enforcement of Order of the National Labor Relations Board.

Filed March 29, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Title of Circuit Court and Cause.]

PETITION FOR REVIEW OF DECISION AND
ORDER OF THE NATIONAL LABOR RE-
LATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

Comes now Intermountain Equipment Company, a corporation, and files its petition pursuant to the provisions of the Labor Management Relations Act of 1947, as amended, (Chapter 20, 61 Stat. 136 et. seq.; 29 U.S.C.A., § 141 et. seq. (1954 Pocket Part)), hereinafter referred to as the Act, for the review of the Decision and Order of the National Labor Relations Board entered in Washington, D. C., on the 16th day of December, 1955, in NLRB Case No. 19-CA-948, ordering and directing that petitioner cease and desist from certain alleged violations of Section 8 (a) (1) and (3) of the Act, and respectfully represents to this Court as follows:

I.

Jurisdiction

That petitioner is a corporation organized and existing under and by virtue of the laws of the state of Idaho, with its principal place of business being at Boise, Idaho.

That respondent National Labor Relations Board, hereinafter referred to as the Board, is an agency of the government of the United States of America,

originally created pursuant to an act of Congress dated July 5, 1935, commonly known as the National Labor Relations Act (Chapter 372, 49 Stat. 451; 29 U.S.C.A. § 153) and continued in existence under the Labor Management Relations Act of 1947, as amended (Chapter 20, 61 Stat. 139; 29 U.S.C.A., § 153 (1954 Pocket Part)); that said Board has an office and a Regional Director located in Seattle, State of Washington, within the Ninth Circuit and within the jurisdiction of this Court; that all of the acts and conduct constituting the alleged unfair labor practices with which petitioner is charged occurred in the state of Idaho within the Ninth Circuit and within the jurisdiction of this Court; that accordingly this Court has jurisdiction to hear this petition by virtue of Section 10 (f) of the Act (29 U.S.C.A. § 160 (f), 1954 Pocket Part):

II.

Statement of Proceedings

(a) Filing of charges: That the General Teamsters, Warehousemen and Helpers, Local 483, hereinafter referred to as the Union, on the 11th day of January, 1954, filed a Charge with the National Labor Relations Board at its Nineteenth Regional Office in Seattle, Washington, and on March 8, 1954, filed an Amended Charge to the effect that your petitioner had engaged and was engaging in unfair labor practices, affecting commerce within the meaning of Section 8 (a) (1), (3) and (5) of the Act.

The charging party was General Teamsters, Warehousemen and Helpers, Local Union 483.

(b) Complaint and its contents: That thereafter on the 7th day of September, 1954, the Board issued its complaint against the petitioner in substance alleging that the Intermountain Equipment Company, the petitioner herein, had engaged in and was engaging in unfair practices affecting commerce within the meaning of Section 8 (a) (1), (3) and (5) and Section 2 (6) and (7) of the Act.

(c) Answer and its contents: That thereafter on the 15th day of September, 1954, petitioner filed its answer, and on September 27, 1954, filed its amended answer admitting that it was a corporation engaged in interstate commerce, but denying generally and specifically the allegations of the complaint charging the petitioner with committing unfair labor practices.

(d) Proceedings before the Trial Examiner: That thereafter a hearing was held on September 28, 29, and October 1, 1954, in Boise, Idaho, before James R. Hemingway, Esq., a Trial Examiner appointed by the Board to hear said cause. Both the petitioner and the Union filed written briefs with the Trial Examiner, and on or about the 8th day of December, 1954, the said James R. Hemingway made and entered his Intermediate Report which he filed with the National Labor Relations Board, wherein he found and concluded that the petitioner had not refused to bargain with the Union within

the meaning of Section 8 (a) (5) of the Act as charged, and he accordingly recommended that the complaint be dismissed as to the refusal to bargain charge. However, he further found and concluded that petitioner had discriminated in regard to terms and conditions of employment of certain of its employees within the meaning of Section 8 (a) (3) of the Act, and recommended certain remedial action therefor.

(e) Order transferring case to National Labor Relations Board: That subsequent to the filing of said report the National Labor Relations Board made and entered its order transferring to and continuing said case before the Board.

(f) Filing objections and brief: That thereafter and on or about the 7th day of January, 1955, this petitioner filed its Exceptions to Intermediate Report and Recommended Order, Findings of Fact, Conclusions of Law, and Recommendations of the Trial Examiner, its Motion for an order permitting Oral Argument, and its written brief in support of its Exceptions. On or about the same time the Union filed its brief in support of the Intermediate Report.

(g) Order and decision of the Board: That thereafter, on the 16th day of December, 1955, the Board by a panel of three of its members, entered its Decision and Order in the above-entitled cause, adopting the findings, conclusions, and recommendations of the Trial Examiner as set forth in his Intermediate Report. Said Decision and Order adopted

and confirmed the finding of the Trial Examiner to the effect that the petitioner had not refused to bargain as alleged, and accordingly the Board dismissed the Complaint insofar as it alleged that petitioner had violated Section 8 (a) (5) of the Act. Petitioner does not seek review of that portion of the Board's Decision and Order.

Said Decision and Order further found and held that petitioner had violated Section 8 (a) (1) and (3) of the Act by discontinuing bonuses and paid sick leave for the employees represented by the Union. This finding and holding was not unanimous, but was a two-to-one decision, the Honorable Boyd Leedom, Chairman, dissenting.

Said Decision and Order required petitioner to cease and desist from certain alleged unfair labor practices, to post the usual notices, to make certain payments to the employees in the bargaining unit, and to notify the Regional Director for the Nineteenth Region of the Board of petitioner's steps to comply therewith.

(h) Motion for reconsideration: That on or about January 16, 1956, petitioner filed a written motion with the Board, seeking reconsideration and an opportunity for oral argument before the entire Board, which motion was summarily denied by the Board on or about the 26th day of January, 1956. Petitioner, in good faith, is expeditiously seeking Court review of the Board's Decision and Order.

III.

Grounds for Review

Petitioner respectfully seeks Court review of said Decision and Order of the Board, upon the following grounds:

1. That insofar as said Decision and Order found this petitioner had violated the Act, said findings, decision, and order are not supported by substantial evidence on the record considered as a whole, and are in fact contrary to the evidence.

2. That insofar as said Decision and Order found this petitioner had violated the Act, said Decision and Order are contrary to law.

3. That the majority opinion of the Board in said Decision and Order is based upon an improper construction and Interpretation of the law.

IV.

Prayer

Wherefore, petitioner petitions this Court for a review of the Decision and Order of the Board dated December 16, 1955, and prays:

1. That a copy of this petition and of the process of this Court be served upon the respondent National Labor Relations Board, as provided by Section 10 (f) of the Act.

2. That the Board be directed and required by an appropriate order of this Court, forthwith, to certify and file with this Court, pursuant to Section

10 (f) of the Act, a transcript of the entire record in the proceedings, including therein the Trial Examiner's Intermediate Report, all exhibits and the originals of all papers filed with the Board from which the complaint was formulated and issued, and the transcript of testimony at the hearing before the Trial Examiner.

3. That this petition for review be preferred and heard and determined expeditiously, as provided in Section 10 (i) of the Act.

4. That the said Decision and Order, and the mandatory and injunctive requirements and provisions thereof as to the petitioner be each and in all respects annulled, vacated, and set aside, except insofar as it dismisses that portion of the complaint alleging that petitioner refused to bargain.

5. That the Board be ordered and directed to dismiss the complaint and proceedings.

6. That the petitioner shall have such other and further relief as may be just and proper in the premises.

Dated this 16th day of February, 1956.

/s/ LOUIS H. CALLISTER,

NATHAN J. FULLMER,

Attorneys for Petitioner.

[Endorsed]: Filed February 17, 1956.

[Title of Court of Appeals and Cause.]

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD TO PETITION TO REVIEW AND SET ASIDE ITS ORDER AND REQUEST FOR ENFORCEMENT OF SAID ORDER

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act (61 Stat. 136, 29 U.S.C., Sec. 151, et seq.), herein called the Act, files this answer to the petition to review and set aside an order issued by the Board against Intermountain Equipment Company, petitioner herein, and the Board's request for enforcement of said order.

1. The Board admits the allegations contained in the portion numbered I of the petition to review.

2. With respect to the allegations contained in the portion numbered II of the petition to review, the Board prays reference to the certified transcript of the record, filed herewith, of the proceedings heretofore had herein, for a full and exact statement of the pleadings and evidence, of the findings of fact, conclusions of law, and order of the Board, and of all other proceedings had in the matter.

3. The Board denies each and every allegation of error contained in the portion numbered III of the petition to review.

4. Further answering, the Board avers that the proceedings had before it, and the findings of fact,

conclusions of law, and order of the Board, were and are in all respects valid and proper under the Act, and pursuant to Section 10 (e) of the Act, respectfully requests this Honorable Court to enforce said order issued against petitioner on December 16, 1955, in the proceedings designated in the records of the Board as Case No. 19-CA-948, entitled, "Intermountain Equipment Company and General Teamsters, Warehousemen and Helpers Local Union 483."

5. Pursuant to Section 10 (e) and (f) of the Act, the Board has certified and filed with the Court a transcript of the entire record in the proceedings before it.

Wherefore, the Board prays that the Court enter a decree denying the petition to review and enforcing in whole said order of the Board.

Dated at Washington, D. C., this 23rd day of March, 1956.

NATIONAL LABOR RELATIONS BOARD,

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel.

[Endorsed]: Filed March 29, 1956.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
PETITIONER INTENDS TO RELY

1. That the National Labor Relations Board, hereinafter referred to as the Board, erred in find-

ing that petitioner's practices regarding bonuses and sick leave had the inherent effect of discouraging Union membership in violation of Sections 8 (a) (1) and (3) of the Labor Management Relations Act of 1947, as amended (61 Stat. 136, 29 U.S.C., Sec. 151, et. seq.), hereinafter referred to as the Act.

2. That the Board erred in finding that the petitioner maintained a practice of compensating its employees for absences due to sickness prior to July 27, 1954.

3. That the Board erred in failing to find that the petitioner at no time evidenced any anti-union motive or feeling.

4. That the Board erred in ordering the petitioner to take certain action to remedy the alleged violations of the Act, including the making whole of petitioner's employees who suffered a loss as the result of nonpayment of the bonuses and sick leave.

LOUIS H. CALLISTER, and
NATHAN J. FULLMER,

THOMAS L. SMITH,
Counsel for Petitioner,

By /s/ NATHAN J. FULLMER.

[Endorsed]: Filed April 2, 1956.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINT UPON WHICH THE
NATIONAL LABOR RELATIONS BOARD
INTENDS TO RELY

Substantial evidence on the record considered as a whole supports the Board's finding that petitioner violated Section 8 (a) (3) and (1) of the National Labor Relations Act (61 Stat. 136, 29 U.S.C., Sec. 151, et seq.), by withholding from employees within a unit represented by a certified collective bargaining agent bonuses and sick leave payments made to petitioner's unrepresented employees.

Dated at Washington, D. C., this 23rd day of April, 1956.

NATIONAL LABOR RELA-
TIONS BOARD.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel.

[Endorsed]: Filed April 28, 1956.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

INTERMOUNTAIN EQUIPMENT COMPANY,
PETITIONER,
vs.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT,

ON PETITION TO REVIEW AND SET ASIDE A
DECISION AND ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

Brief of the Petitioner
Intermountain Equipment Company

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Salt Lake City, Utah
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JUL 17 1956
PAUL P. O'BRIEN, CLE

FILED

INDEX

TABLE OF CONTENTS

	Page
INTRODUCTION	1
BASIS FOR JURISDICTION	2
STATEMENT OF THE CASE	3-9
STATEMENT OF POINTS	9
SUMMARY OF ARGUMENT	10-11
ARGUMENT	11-43
POINT NO. I. THE BOARD ERRED IN FINDING AND CONCLUDING THAT THE COMPANY'S PRACTICES REGARDING BONUSES AND SICK LEAVE HAD THE INHERENT EFFECT OF DISCOURAGING UNION MEMBERSHIP IN VIOLATION OF SECTIONS 8 (a) (1) and (3) OF THE ACT.	11-26
POINT NO. II. THE BOARD ERRED IN FINDING THAT THE COMPANY MAINTAINED A PRAC- TICE OF COMPENSATING ITS EMPLOYEES FOR ABSENCES DUE TO SICKNESS PRIOR TO JULY 27, 1954.	26-30
POINT NO. III. THE BOARD ERRED IN FAILING TO FIND THAT THE COMPANY AT NO TIME EVIDENCED ANY ANTI-UNION MOTIVE OR FEELING.	31-41
POINT NO. IV. THE BOARD ERRED IN ORDER- ING THE COMPANY TO TAKE CERTAIN AC- TION TO REMEDY THE ALLEGED VIOLA- TIONS OF THE ACT, INCLUDING THE MAK- ING WHOLE OF ITS EMPLOYEES WHO SUF- FERED AS THE RESULT OF NONPAYMENT OF BONUSES AND SICK LEAVE.	41-43
CONCLUSION	43-44

INDEX — Continued

CASES CITED

	Page
N.L.R.B. Administrative Decision No. 883, January 13, 1954, 33 LRRM 1234	21-22
N.L.R.B. Administrative Decision No. 909, March 25, 1954, 33 LRRM 1461	22-23
<i>N.L.R.B. v. Chronicle Publishing Co.</i> (CA 7th, March 2, 1956) 230 F. 2d 543, 37 LRRM 2632	38-39
<i>N.L.R.B. v. Nash Finch Company</i> , (CA 8th, April 13, 1954) 211 F. 2d 622, 33 LRRM 2898	23, 24, 25
<i>Radio Officers Union v. N.L.R.B.</i> (U.S. Sup. Ct., Feb 1, 1954) 347 U.S. 17; 74 S. Ct. 323	12, 13, 14, 18, 19, 21

STATUTES CITED

Labor Management Relations Act of 1947 as amended, Chapter 120, 61 Stat. 136 et seq., 29 U.S.C.A. § 141, et seq.	12
---	----

TEXTS CITED

National Labor Relations Board Sixteenth Annual Report	13
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

INTERMOUNTAIN EQUIPMENT COMPANY,
PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT,

ON PETITION TO REVIEW AND SET ASIDE A
DECISION AND ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

Brief of the Petitioner
Intermountain Equipment Company

INTRODUCTION

This case is before this Honorable Court upon a petition (R. 275) of Intermountain Equipment Company, an Idaho corporation with its home office and principal place of business at Boise, Idaho, hereinafter called the company, which petition was duly filed pur-

suant to the provisions of the Labor Management Relations Act of 1947, as amended, (Chapter 120, 61 Stat. 136 *et seq.*; 29 U. S. C. A., §141 *et seq.* 1955 pocket part), hereinafter called the Act, and by which petition the company seeks to have this Honorable Court review and set aside a certain Decision and Order (R. 79) made and entered against the company by the National Labor Relations Board, an agency of the government of the United States of America, hereinafter called the Board. In its answer the Board has requested that its order be enforced (R. 282). (The citation "R." followed by a number refers to pages of the printed Transcript of Record.)

JURISDICTION

The company is a corporation organized and existing under and by virtue of the laws of the state of Idaho, with its home office and principal place of business being located at Boise, Idaho (R. 10). All of the acts and conduct constituting the alleged unfair labor practice with which the company is charged occurred in Boise, Idaho within the geographical area of the Ninth Circuit. The Board has an office and a Regional Director located in Seattle, Washington, known as its Nineteenth Region, within the geographical area of the Ninth Circuit. The charge and complaint (R. 9) upon which these proceedings originated issued out of that Nineteenth regional office of the Board. This Honorable Court has jurisdiction to hear and determine this case by virtue of Section 10 (e) and (f) of the Act (29 U. S. C. A., § 160 (e) and (f), 1955 pocket part.)

STATEMENT OF THE CASE

The company is engaged in the business of selling and supplying heavy industrial and construction equipment. In the spring of 1953 the General Teamsters, Warehousemen and Helpers, Local Union No. 483, hereinafter called the union, organized certain of the company's warehouse employees at its Boise operation, and after the Board conducted an election it certified the union as the collective bargaining representative of those of the company's employees in the following described unit:

"All warehouse employees of Intermountain Equipment Company, construction machinery, equipment and parts sales and service plant in Boise, Idaho, including warehousemen, shipping and receiving clerks, price clerks, countermen, order clerks, delivery men, inventory clerks and warehouse filing clerks, excluding all managers, assistant managers, foremen, confidential secretaries, office clerical employees, outside salesmen, professional employees, guards and supervisors as defined in the Act".
(R. 10, 11)

The union was certified on June 26, 1953 (R. 10) and on or about July 3, 1953 Frank Baldwin, secretary-treasurer of the union, contacted Philip Dufford, the company's vice-president and general manager, regarding a contract, and negotiating meetings began on July 22 (R. 98). The union submitted its proposals to the company in the form of a written proposed contract containing provisions commonly found in labor contracts, including provisions on wages, hours, overtime, vacations, holidays, union shop, grievance settlement procedure, etc. *The union's original written*

proposal also included proposals for year-end bonuses and for a specified number of days of paid sick leave (R. 98). The union's written proposal also included a provision to the effect that the employees would retain the special privileges previously enjoyed (R. 212, 219).

The negotiations were conducted by Baldwin, Roy Buntin, and Alvin Stewart (the latter two being employees in the unit) for the union, and by Dufford and Ray Fortune (a labor relations consultant not connected with the company) for the company (R. 113, 114.) Approximately six or seven meetings were held between July 22 and July 27, 1953 and on the latter date an agreement was reached which was reduced to writing and executed by the company and the union (G. C. Ex. 3, R. 103). This written agreement provided, among other things, for union shop, paid holidays and vacations, grievance settlement procedure, overtime after eight hours per day and forty hours per week, and for a wage increase of approximately 26¢ per hour (R. 235). No similar increases or guaranty of benefits were given by the company to its employees who were not in the unit (R. 238, 239). *This agreement did not provide for year-end bonuses, paid sick leave, or a retention of privileges clause, all of which had been proposed by the union.*

For several years prior to the union's certification the company had customarily paid year-end bonuses to substantially all of its employees, including those whose job classifications were in the unit (R. 153). However, the company had no formalized plan

and it considered the payment of a bonus to individual employees to be a matter of discretion and strictly a prerogative of management (R. 149, 150, 151). The company rejected the union's demands to include a bonus clause in the contract, and although the issue was discussed at length in negotiations the contract as finally agreed to and executed did not include a bonus clause (R. 102, 233).

Also prior to the union's certification the company had no formalized practice with respect to compensated absences from work because of sickness or otherwise. Generally the matter of compensation for time not worked was left to the discretion of the company's various department heads, and it appears that the employees were not docked for occasional absences from work because of sickness, personal errands, or otherwise (R. 154, 155). The department heads or foremen kept the time records, and no record was kept as to the reason for absence if an absence was in fact shown on the time sheet (R. 154). The company rejected the union's demands to include a sick leave clause in the contract, and although the issue was discussed at length in negotiations the 1953 contract as finally agreed to and executed did not include a sick leave clause (R. 102, 154).

When the union was certified and a collective bargaining agreement was reached the company installed a time clock for the use of the employees in the unit. Thereafter an accurate record was kept of the hours worked by each employee in the unit and time not worked was not compensated for (R. 157, 160).

At the end of 1953 the company paid year-end bonuses to substantially all of its employees who were not in the unit, but no bonuses were paid to the employees in the unit (R. 12, 17).

On or about January 11, 1954 the union filed a charge with the Nineteenth Regional Office of the Board alleging that the company's failure to pay bonuses constituted an unfair labor practice in violation of the Act (R. 3). On or about March 8, 1954 the union filed an amended charge alleging that the company's failure to pay sick leave and bonuses constituted an unfair labor practice in violation of the Act (R. 5).

At no time has the union or any of the employees made any claim against the company for nonpayment of bonuses or sick leave through the grievance machinery provided in the contract (R. 206-208, 222-223, 227, 239).

During the early summer of 1954, while the charges were still pending, but before they had been acted upon by the Board, the company and the union met and bargained on a new contract. The union again proposed a bonus clause and a sick leave clause, as well as a demand for a wage increase (R. 228,229). As a result of those negotiations a new contract was reached to be effective July 27, 1954 (the expiration date of the first contract). In the new contract the company granted a wage increase and a sick leave clause, but the proposal of the union as to bonuses was again rejected by the company, and the union accepted the contract without a bonus clause (R. 228, 229, 239).

Thereafter, on September 7, 1954, about nine months after the original charge had been filed, the Board issued its complaint against the company, designating the case as Intermountain Equipment Company and General Teamsters, Warehousemen and Helpers, Local Union No. 483, Case No. 19-CA-948, in effect alleging that the company was guilty of refusing to bargain and of unlawful discrimination in violation of Sections 8 (a), (1), (3), and (5) of the Act (R. 9). On or about September 15, 1954 the company filed its answer and on or about September 27, 1954 its amended answer admitting the jurisdictional facts and denying the commission of the unfair labor practices alleged (R. 14, 19).

A hearing was held on September 28, 29 and October 1, 1954 in Boise, Idaho before James R. Hemingway, Esq., a Trial Examiner appointed by the Board to hear the case, and on or about December 8, 1954 the Trial Examiner made and entered his Intermediate Report (R. 23) wherein he found and concluded that the company had not refused to bargain with the union within the meaning of Section 8 (a) (5) of the Act as charged, and he accordingly recommended that the complaint be dismissed as to the refusal to bargain charge. However, he further found and concluded that the company had discriminated in regard to the terms and conditions of employment of its employees in the unit within the meaning of Section 8 (a) (3) of the Act, and he recommended certain remedial action therefor (R. 61-63).

Thereafter on or about January 7, 1955 the com-

pany duly filed its written Exceptions to the Trial Examiner's Intermediate Report (R. 65), and a brief in support of its Exceptions. At approximately the same time the union filed its brief in support of the Intermediate Report.

Thereafter, on or about December 16, 1955 the Board, by a panel of three of its members, entered its Decision and Order whereby the Board adopted the findings, conclusions and recommendations of the Trial Examiner (R. 79). Said Decision and Order adopted and confirmed the finding of the Trial Examiner to the effect that the company had not refused to bargain as alleged, and accordingly the Board dismissed the complaint insofar as it alleged that the company had violated Section 8 (a) (5) of the Act (R. 87). The company does not seek review of that portion of the Board's Decision and Order.

Said Decision and Order found and held that the company had violated Section 8 (a) (1) and (3) of the Act by not paying bonuses in 1953 to its employees in the unit and by not compensating them for absences from work due to illness. The Decision and Order required the company to cease and desist from the commission of the alleged unfair labor practices, to post the usual notices and to make certain payments to the employees in the unit (R. 85-87).

This Decision and Order of the Board was not unanimous, but rather it was a two-to-one decision, the Honorable Boyd Leedom, Chairman, having written a vigorous dissent (R. 88-93).

Thereafter the company filed its motion with the Board seeking reconsideration and an opportunity for oral argument, which motion was summarily denied by the Board on or about January 26, 1956. The company thereupon filed its petition (R. 275) with this Honorable Court seeking review of the Board's Decision and Order and praying that the same be set aside. The Board, in its answer to the company's petition, seeks enforcement of the Decision and Order (R. 282).

STATEMENT OF POINTS

POINT NO. I

THE BOARD ERRED IN FINDING AND CONCLUDING THAT THE COMPANY'S PRACTICES REGARDING BONUSES AND SICK LEAVE HAD THE INHERENT EFFECT OF DISCOURAGING UNION MEMBERSHIP IN VIOLATION OF SECTIONS 8 (a) (1) AND (3) OF THE ACT.

POINT NO. II

THE BOARD ERRED IN FINDING THAT THE COMPANY MAINTAINED A PRACTICE OF COMPENSATING ITS EMPLOYEES FOR ABSENCES DUE TO SICKNESS PRIOR TO JULY 27, 1954.

POINT NO. III

THE BOARD ERRED IN FAILING TO FIND THAT THE COMPANY AT NO TIME EVIDENCED ANY ANTI-UNION MOTIVE OR FEELING.

POINT NO. IV

THE BOARD ERRED IN ORDERING THE COMPANY TO TAKE CERTAIN ACTION TO REMEDY THE ALLEGED VIOLATIONS OF THE ACT, INCLUDING THE MAKING WHOLE OF ITS EMPLOYEES WHO SUFFERED AS THE RESULT OF NONPAYMENT OF BONUSES AND SICK LEAVE.

SUMMARY OF ARGUMENT

POINT NO. I

Section 8 (a) (5) of the Act does not outlaw *all* differential treatment of employees. To establish a violation of that Section the Board must show by a preponderance of the evidence not only that the employer discriminated, but also that the purpose, motive, or intent of the discrimination was to encourage or discourage union membership or activity.

This purpose or motive of the employer is the element which actually controls the final determination as to whether or not the conduct is unlawful.

While such purpose or motivation may be inferred in the absence of any direct evidence of motivation, where the discrimination is of such a nature that it inherently encourages or discourages, it should not be inferred so as to find an employer guilty of *discouraging* union membership in the face of uncontroverted direct evidence that the employer had no anti-union motive or feeling and had at all times dealt with the union in good faith.

POINT NO. II

There is not substantial evidence in the record considered as a whole to support the finding that the company had an established sick leave policy prior to July 27, 1954 when it executed a written contract with the union which provided paid sick leave to the employees in the unit. Consequently all of the findings, conclusions, and inferences to the effect that the company

discriminated against the employees in the unit by denying them sick leave are in error.

POINT NO. III

The company at no time displayed any anti-union feeling or motive. This is clear from the testimony of the union's own witnesses. In view of the uncontroverted evidence the Board erred in failing to make an express finding to this effect.

POINT NO. IV

The Board should not, and in the past has not, entered into the field of collective bargaining to write or rewrite contracts between the parties. The action of the Board in this case is to bestow upon the employees in the unit benefits which it may think the union should have won for them at the bargaining table but failed to do so. Such action by the Board detracts from and discourages good faith collective bargaining and thereby does violence to the purposes of the Act.

ARGUMENT

POINT NO. I

THE BOARD ERRED IN FINDING AND CONCLUDING THAT THE COMPANY'S PRACTICES REGARDING BONUSES AND SICK LEAVE HAD THE INHERENT EFFECT OF DISCOURAGING UNION MEMBERSHIP IN VIOLATION OF SECTIONS 8 (a) (1) AND (3) OF THE ACT.

The Board has concluded that the company's "disparate treatment concerning bonuses and sick leave had the inherent effect of *discouraging* union membership and therefore constituted a violation of Section

8 (a) (3) and (1) of the Act *** ". (R. 81, emphasis added). The pertinent provisions of those sections of the Act are as follows:

Section 8. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this act;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to *encourage* or *discourage* membership in any labor organization: **** (emphasis added).

It should be noted that Section 8 (a) (3) does not outlaw *all* differential treatment of employees as such. Only such discrimination as encourages or discourages membership in a labor organization is prohibited, and it is as much a violation to *encourage* as to *discourage*. As the Supreme Court of the United States has said:

The language of § 8 (a) (3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed. *Radio Officers Union v. N. L. R. B.*, (U. S. Sup. Ct., Feb. 1, 1954) 347 U. S. 17, 74 S. Ct. 323, 337.

The relevance of the employer's motive in a discrimination case is of prime importance in determining whether or not the conduct complained of is in fact a violation of Section 8 (a) (3). As the Board has repeatedly stated:

Upon scrutiny of all the facts in a particular case, the Board must determine whether or not the employer's treatment of the employee was motivated by a desire to encourage or discourage union membership or other activities protected by the statute. *The Board requires that a preponderance of the evidence show an employer's illegal motive in order to establish a violation of 8 (a) (3)*, except in case of per se violations such as the discharge of an employee because of activities protected by the statute. *The burden of proving unlawful motivation rests with the General Counsel.* (Sixteenth Annual Report of the National Labor Relations Board, page 162, emphasis added).

The United States Supreme Court recognized this principle in the *Radio Officers* case, *supra*, when it said:

The relevance of the motivation of the employer in such discrimination has been consistently recognized under both § 8 (a) (3) and its predecessor. In the first case to reach the Court under the National Labor Relations Act, *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615, 628, 81, L. Ed. 893, in which we upheld the constitutionality of § 8 (3), we said with respect to limitations placed upon employers' right to discharge by that section that "the [employer's] true purpose is the subject of investigation with full opportunity to show the facts." In another case the same day we found the employer's "real

motive" to be decisive and stated that "the act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees." Courts of Appeals have uniformly applied this criteria, and writers in the field of labor law emphasize the importance of the employer's motivation to a finding of violation of this section. Moreover, the National Labor Relations Board in its annual reports regularly reiterates this requirement in its discussion of § 8 (a) (3). For example, a recent report states that "upon scrutiny of all the facts in a particular case, the Board must determine whether or not the employer's treatment of the employee was motivated by a desire to encourage or discourage union membership or other activities protected by the statute."

That Congress intended the employer's purpose in discriminating to be controlling is clear. *** (*Radio Officers* case, *supra*, 74 S. Ct. 323, 337).

In the instant case the company's alleged violation is one of *discouraging* union membership. What are the facts relied upon by the Board to support a finding of this violation?

Prior to the certification of the union the company ran its business and regulated the wages, hours, and working conditions of its employees as it saw fit, without any contractual obligations. The company was free to increase or decrease wages; change, modify or terminate fringe benefits; pay or not pay bonuses, etc. The company had no contractual obligation to maintain any existing conditions for any of its employees, but rather it was free to make such changes as its management considered to be in the best interests of the company. There was nothing to

prevent wage and benefit changes from day to day or week to week. This was true with the payment of bonuses also.

When the union was certified as the collective bargaining agent for the unit described above and a collective bargaining agreement was negotiated and executed, the company's relationship *with its employees in the unit* was substantially changed. The company's freedom of action was greatly restricted by (1) the provisions of the Act which required the company to bargain with the union rather than deal with the employees direct, and (2) the provisions of the contract which absolutely committed and obligated the company to the terms and conditions therein contained, and fixed a minimum on wages and other economic benefits below which the company could not go during the life of the contract. The union did not represent and the contract did not apply to and protect *all* of the company's employees. Only about 13 or 14 out of approximately 65 employees at the Boise establishment were in the unit (R. 188, 149). *All* of the employees in the unit enjoyed the benefits and protection of the union contract. *None* of the employees outside the unit enjoyed those benefits and that protection. There is no evidence in the record, and indeed it is not claimed by the Board, that the company engaged in any disparate treatment of various employees *within the unit*. On the contrary, all employees within the unit were treated exactly alike, whether they were union members or not. There is no evidence to show disparate treatment on the basis of membership or non-member-

ship in the union, either within or without the unit, except for the lawful discrimination inherent in the provisions of a union shop clause contained in the contract, put there at the request of the union and with the blessing of the Act.

Now since those employees in the unit represented by the union received, through collective bargaining and were guaranteed by written contract, many benefits which those employees not in the unit and not so represented did not receive and were not guaranteed, it may well be argued that those employees not in the unit were thereby inherently encouraged by the company to seek membership in a labor organization, and that the company was thereby guilty of the violation of *encouraging*. The company is charged, however, not with encouraging, but rather with discouraging union membership by its handling of bonuses and sick leave.

(a) Bonus Payments

For several years prior to 1953 the company had paid year-end bonuses to substantially all of its employees, including those whose job classifications subsequently were included in the unit. The company had no formal bonus plan, and it consistently took the position that the payment of the bonuses was strictly discretionary and a prerogative of management (R. 99, 149-151). During the negotiations leading to the 1953 contract the union's demand for a bonus clause was discussed and rejected by the company, its general manager, Mr. Dufford, taking the position that payment of bonuses was a prerogative of management and that the company could not and would not be bound

by contract to pay bonuses. Dufford further stated that the company did not intend to discriminate as to the payment of bonuses (R. 265). The contract as signed did not contain a bonus clause.

At the end of 1953 the company paid bonuses to substantially all of its other employees, but it did not pay bonuses to any of the employees who were in the unit and covered by the contract (R. 12, 17). There is nothing in the record to show that there was discrimination on the basis of union membership or non-membership. The criterion was whether or not the employee was in the unit and covered by the contract.

(b) Sick Leave

It is the company's position that prior to the 1954 contract when a sick leave provision was written covering employees in the unit the company had no sick leave policy, and that the Board erred when it found to the contrary. This point is argued at length under Point II, *infra*.

The Board has concluded, however, that the company's practices regarding sick leave constituted a violation of the Act.

Prior to the certification the company had no time clock and it did not keep accurate records of actual hours worked. Time records were kept by the various foremen and occasionally an employee would be absent from work for a few hours or a day and would not be docked for it. There was no policy with regard to this and the foremen exercised considerable discretion. There was no paid sick leave as such, al-

though the union's 1953 proposals contained a sick leave clause which was discussed and rejected. The signed contract did not include a sick leave clause.

With the certification and subsequent contract the company installed a time clock and for the first time kept accurate time records. Instructions were given to the foremen that the employees were to be paid only for hours worked as shown by the time clock records.

This is the disparate treatment complained of. The Board has said little or nothing about the company's motives, but rather has stated that under the *Radio Operators* case, *supra*, the requisite motive can be inferred. It is true that in that case the Supreme Court said:

But it is also clear that *specific evidence of intent* to encourage or discourage is not an indispensable element of proof of violation of § 8 (a) (3). *** (ibid 74 S. Ct. 323, 338, emphasis added).

However, we submit that the *Radio Officers* case does not stand for the proposition that an employer may be convicted of a violation of § 8 (a) (3) upon evidence showing nothing more than that he treated some of his employees in other departments and jobs differently than he treated employees in one department or unit for which the Board had certified a union as collective bargaining representative. That is essentially the instant case.

The unit found by the Board to be appropriate for purposes of collective bargaining was made up of the company's parts department employees, who, because

of the nature of their work, were paid on an hourly basis. The company's other employees were paid on a salary basis (R. 162-164). The union was the exclusive bargaining representative for *all* of the employees in the unit, and the collective bargaining agreement covered *all* of the employees in the unit. There was no disparate treatment among employees within the unit. Consequently the instant case is clearly distinguishable from the facts of the *Radio Officers* case wherein the Supreme Court said:

The union's representative status obviously does not effect the legality of the gratuitous payment. According to the reasoning of the Second Circuit, however, disparate payments based on contract are illegal only when the union, as bargaining agent for both union and non-union employees, betrays its trust and obtains special benefits for the union members. That court considered such action unfair because such employees are not in a position to protect their own interests. Thus, it reasoned, if a union bargains only for its own members, it is legal for such union to cause an employer to give, and for such employer to give special benefits to the members of the union for if non-members are aggrieved they are free to bargain for similar benefits for themselves.

*We express no opinion as to the legality of disparate payments where the union is not exclusive bargaining agent since that case is not before us. *** (Radio Officers case, supra, 74 S. Ct. 323, 339, emphasis added.)*

We submit that if an employer is not guilty of unlawful *encouragement* where he gives special benefits to those of his employees represented by the union pursuant to contract while denying such benefits to

his unrepresented employees, the reverse should also be true, that is he is not guilty of unlawful *discouragement* where he gives special benefits to those of his employees not represented by the union while denying such benefits to his union represented employees whose contract does not call for such benefits. This must be true, for in the language of the Supreme Court, *supra*, if the union represented employees "are aggrieved they are free to [have the union] bargain for similar benefits."

While the requisite motive and intent to discriminate need not be established by specific evidence, we submit that the Board cannot reasonably infer that motive and intent in the instant case.

The company is charged with *discouraging* union membership. The record is barren of any showing or suggestion of anti-union motivation or feeling, and it abounds with evidence that the company at all times was conscious of its duties and obligations under the Act, and its dealings with the union were friendly, as is discussed in detail under Point III of this brief. In the initial contract, bargained in record time, the company agreed to a union shop clause and granted concessions on nearly all of the union's demands. Such conduct is certainly not typical of an employer seeking to undermine and discourage unionism. Here there is no background of anti-union activity or any overt act which can form the basis for any inference of anti-union motive or feeling. Yet in the face of that record the Board infers "an illegal motive" when the company pays a year-end bonus to its other employees but not

to those covered by the union contract. Such action by the Board is even more unreasonable when it is pointed out, as Chairman Leedom does in his dissenting opinion (R. 91), that the year-end bonus was less than half the amount of the hourly wage increase granted to the employees under the contract but not to the other employees.

We submit that in his dissenting opinion Chairman Leedom correctly analyzed the *Radio Officers* case, *supra*, when he stated:

From the foregoing it appears that Radio Officers, insofar as here pertinent, holds merely, in effect, that the Board may infer intent to encourage or discourage union membership (a) where there is no countervailing evidence other than the employer's naked disclaimer of any such intent, and (b) where the treatment of union employees is obviously more favorable than the treatment of non-union employees. In my opinion neither of these conditions is present here (R. 89).

We submit that the instant case is not a proper one for the inference of an illegal motive. Nor is our conclusion in this respect contrary to previous Board policy as shown by the following administrative rulings of the Board's General Counsel:

Case No. 883 (January 13, 1954) 33 LRRM 1234, wherein the Regional Director was sustained in his refusal to issue a complaint charging violations of Section 8 (a) (1), (3), and (5) of the Act by withholding payment of a Christmas bonus from employees represented by the Union while paying such bonus to employees not represented by the Union. The report says in part:

The evidence is insufficient to establish an illegal motive in the failure to pay the bonus in view of (1) the absence of any contractual obligation to pay a bonus, (2) the economic reasons advanced to the company for not paying a bonus, (3) the attempt to balance the wage structure between the employees in the bargaining unit and those not in the unit, and (4) the absence of any union animus.

The only evidence of independent 8 (a) (1) violation is the foremen's statement to an employee who asked about the 1951 bonus, "When you guys walked out of the door, your Christmas bonuses went with you." This statement is not, in itself, violative of the Act in the light of its isolated character and the absence of any union animus on the part of the company.

Case No. 909 (March 25, 1954) 33 LRRM 1461, wherein the Regional Director was sustained in his refusal to issue a complaint charging violations of Section 8 (a) (1), (3), and (5) of the Act by withholding payment of a Christmas bonus from employees represented by the Union while paying such bonus to employees not represented by the Union. The report states:

The company paid a Christmas bonus to all employees in 1950 and 1951, based upon 5 per cent of gross earnings. The union was certified as representative of production and maintenance employees in October 1952, and negotiated a contract with the company. The contract provided for an 8-cent pay increase for employees in the unit. *The union asked if the contract would affect the bonus, and the employer replied that it would not as the bonus was discretionary anyway.*

In 1952, the company paid a Christmas bonus to its salaried employees only. At a meet-

ing requested by the union to discuss nonpayment of the bonus to employees represented by the union, the employer said it had decided not to pay the bonus to them because production had been lower and volume of shipments less. The employer also explained that the salaried employees had received the bonus in order to balance the wage structure, as these employees had received no increase equivalent to that obtained by employees in the unit.

In support of its position, the company supplied figures for only three of the six months on which the bonus would have been based. The employer's failure to present a complete record of its production figures was at most only a suspicious circumstance and not a violation of the Act. There was no independent 8 (a) (1) violation on the part of the company and no background of union hostility or antiunion motives. (Emphasis added)

The position of the Board is also contrary to court decisions. We submit that the case of *NLRB v. Nash Finch Company* (CA 8th, April 13, 1954) 211 Fed. 2d 622, 33 LRRM 2898, is directly in point and is controlling of the issues here. That case was on a petition of the Board for enforcement of its Order. The Board had found that the Employer had violated Sections 8 (a) (1), (3), and (5) of the Act by discontinuing *a well established program* of hospital and group life insurance to employees represented by the Union shortly after the Union was certified, and by refusing to pay those employees annual Christmas bonuses while continuing such benefits to other employees. Those other employees did not receive the wage increases which had been granted to those employees represented by the Union. The Board also found that the Employer

had repeatedly threatened to take such benefits away from the employees if they voted for the Union. (There is no similar finding of anti-union threat or feeling in the instant case). The insurance and bonus benefits which existed prior to the certification of the Union in that case were well established and in some instances a matter of contract between the Employer and individual employees. These benefits were discontinued after the signing of the contract with the Union, the terms of which were silent as to their continuance or discontinuance.

In denying enforcement of the Board's Order (which included a cease and desist order and an order to pay to the employees losses suffered as a result of the discontinuance of the insurance and bonus benefits) the United States Court of Appeals for the 8th Circuit said:

We consider untenable the position of the Board that, although the respondent had assumed no contractual obligation to continue the insurance and bonus benefits which it had formerly provided for the employees represented by the Union, the respondent was obligated by law to continue such benefits unless and until it terminated them after further bargaining with the Union.

*The respondent, we think, may not be convicted of an unfair labor practice for doing no more and no less for its union employees than its collective bargaining agreement with them called for. "And it is *** clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining*

agreements." National Labor Relations Board v. American National Insurance Co., 343 U. S. 395, 404 (30 LRRM 2147). Whether the contract in suit should have contained the clause proposed by the Union requiring the maintenance of existing standards of employment was "an issue for determination across the bargaining table, not by the Board." Id., page 409 of 343 U. S.

It seems to us that what the Board has done, under the guise of remedying unfair labor practices, is to attempt to bestow upon the respondent's union employees the benefits which it believes the Union should have obtained but failed to obtain for them as a result of its collective bargaining with the respondent on their behalf.

Our conclusion is that the Board is not entitled to the enforcement of its order. Its petition for enforcement is denied. (211 F. 2d at p. 626, 627, emphasis added).

It should be noted that the *Nash-Finch* decision came down some two and one-half months after the *Radio Officers* case, and that one of the cases consolidated in *Radio Officers* was from the Eighth Circuit. Consequently it is reasonable to assume that the Eighth Circuit, in deciding *Nash-Finch* concluded that the rule laid down by *Radio Officers*, so heavily relied upon by the Board in the instant case, did not apply. This certainly supports the position of the dissenting Chairman and the petitioner herein.

It should also be noted that although petitioner strongly argued the *Nash-Finch* case in its briefs before the Board that the Board in its Decision and Order strangely fails to mention the case.

In conclusion of Point I we submit that upon the law and the facts as shown by the record the Board erred in finding and concluding that the company's practices regarding bonus and sick leave had the inherent effect of discouraging union membership in violation of § 8 (a) (1) and (3).

POINT NO. II

THE BOARD ERRED IN FINDING THAT THE COMPANY MAINTAINED A PRACTICE OF COMPENSATING ITS EMPLOYEES FOR ABSENCES DUE TO SICKNESS PRIOR TO JULY 27, 1954.

In its Decision and Order the Board stated that the company "had also maintained a practice of compensating its employees for absences due to sickness." (R. 80). This statement is not supported by substantial evidence on the record considered as a whole. Similar statements of the Trial Examiner were duly excepted to by the company (R. 68).

Mr. Dufford, vice president and general manager of the company, testified that in the contract with the union effective July 27, 1954 the company was required to keep a record of sick leave and pay sick leave up to six days per year (R. 154). During the life of the first contract (July 27, 1953, to July 26, 1954) there was no sick leave provision and no sick leave was paid (R. 154, G. C. Exhibit 3, R. 103). He further testified that prior to unionization the company had no established policy or practice governing sick leave (R. 155, 156), and that the company had no records which would show whether a given employee's absence from work was because of illness or some

other reason (R. 155). This testimony is undisputed and is entitled to consideration.

Prior to the signing of the first contract it is not denied that on occasion employees of the company have been paid while absent from duty (R. 157). Such cases were up to the supervisor of the employee involved, who had authority to authorize such payment whether the absence was caused by illness, errands, or otherwise. There was no established pattern or practice, and no ground rules regulating the supervisor in such matters (R. 155).

Frank Baldwin, the secretary-treasurer of the union, testified that he did not discuss the company's past practice regarding sick leave with Dufford in negotiations (R. 136, 139) and that actually he didn't know what the practice was.

From this the Board concludes that the company had a paid sick leave policy prior to the union being certified and that the company illegally and discriminatorily discontinued it as to the employees in the unit immediately upon signing the contract and continued it to the other employees.

When viewed in the proper light of all the facts this alleged unlawful and anti-union action becomes simple, logical, lawful and honest. It is undisputed that of all the company's employees, those comprising the bargaining unit lent themselves more readily to an hourly compensation basis than the others (R. 172), and that with the exception of occasional temporary help and some service employees who operated under

the Belo plan, the employees who made up the unit were the only ones paid on an hourly basis, the other employees being salaried (R. 163, 164, 172).

Prior to the union's certification time records on the hourly employees were kept by the supervisors. No record was kept as to the reason for absences, and a supervisor could, if he thought it proper, excuse an employee and have him paid for time not worked. While the company has always paid overtime at the rate of time and one-half for hours worked in excess of forty in a week no *daily* overtime or limit on hours was observed prior to the first contract. The company and its employees had been "satisfied with its own loose-knit way of doing business prior to that." (R. 159). The union contract, however, required payment of overtime for all hours worked in excess of eight in one day as well as in excess of 40 in one week (R. 104). Anticipating that to properly abide by and comply with a union contract the company should have more accurate records, Mr. Dufford had a time clock installed for use by the employees in the unit. When asked why he installed the time clock Mr. Dufford replied,

A. For the protection, the benefit of the members of the unit and management, to be certain, and that we had to maintain an accurate record, which was not deemed necessary before. (R. 158)

* * *

Trial Examiner. See if I understand you correctly—you said that the reason for installing the time clock was because of the fact that you anticipated that you would be held to a stricter accounting, was that it?

The Witness: Yes. And I also said that the installation of the time clock was for the bene-

fit of the members of th unit as well as for management, and it gave us a record on which we might be able to stand, and I hoped that it would avoid any possible disputes over hours. (R. 171).

When the contract was signed the employees were instructed to punch out on the time clock whenever they left work for any cause. Thus the company had an accurate record upon which both sides could rely for figuring overtime pay, etc. The supervisors were instructed to abide strictly by the terms of the contract and to pay by the time clock records.

From this the Board concludes that the "practice of compensating its employees for absences due to sickness" was discontinued, and infers a corrupt and evil intent to discourage union membership thereby.

We submit that there was nothing illegal, immoral or unreasonable in the company's actions concerning the time clock and the strict application of the contract. With the signing of the contract the company incurred a daily overtime expense which it did not have before. It incurred wage claim and arbitration responsibilities which it did not have before. The steps taken by the company to insure adequate records and minimize disputes over hours were not only proper and reasonable, but are further evidence of the company's bona fide attempt to deal fairly with its organized employees.

The Board's statement that "paid sick leave was continued, however, for those employees not in the unit represented by the Union" (R. 81) is not only unsupported by substantial evidence but is patently

unfair and misleading. None of the employees other than those in the unit have any assurance of paid sick leave (R. 168). There is no evidence to the contrary. Those employees, being on salary, may have some advantages which hourly wage employees do not have, which are inherent in the nature of salary compensation, but this fact does not constitute unlawful discrimination.

In conclusion of the argument of Point II we submit that all the record shows is that the company made certain changes from its rather "loose-knit" operation and record keeping to a more accurate and businesslike way of handling its record keeping, and applied the terms of its contract to the facts shown by the records. Can it reasonably be argued that the employees have a vested right to continued lax and loose operation when their collective bargaining agent has successfully negotiated many substantial benefits and improved working conditions? Clearly not! And in the words of the *Nash Finch* case, *supra*, the company "may not be convicted of an unfair labor practice for doing no more and no less for its union employees than its collective bargaining agreement with them called for".

The record does not support a finding that the company had an established paid sick leave practice, and the Board's contrary finding is erroneous. Clearly there is no showing that the company's conduct in this regard constitutes such "disparate treatment" as has "the inherent effect of discouraging union membership."

POINT NO. III

THE BOARD ERRED IN FAILING TO FIND THAT THE COMPANY AT NO TIME EVIDENCED ANY ANTI-UNION MOTIVE OR FEELING.

Neither the Trial Examiner nor the Board found that the company had ever evidenced any anti-union motive or feeling, nor could they have so found since the record is completely devoid of any evidence to that effect. On the other hand both the Trial Examiner and the Board have failed to make an express finding of no anti-union motive or feeling, and in so doing both have ignored substantial and uncontroverted evidence, including the testimony of the union's own witnesses.

The failure of the Trial Examiner to make such an express finding was duly excepted to by the company (R. 78).

We respectfully refer the Honorable Court to the following portions of the testimony of Frank T. Baldwin, Secretary-Treasurer of the union:

Q. At no time was there a refusal to bargain on the part of the Intermountain Equipment Company?

A. You mean during the first meeting?

Q. Yes. Any of the meetings.

* * *

A. No. They never refused to bargain, no. (R. 123).

Q. (Interrupting): There was heated discussion, in other words?

A. That is it.

Q. And some animosity, perhaps?

A. Well, I wouldn't say animosity. It was just a heated discussion.

Q. It was conducted in a perfectly friendly spirit, was it?

A. That is right.

Q: In other words —

A. (Interrupting): I always do.

Q. In other words, the words flew thick and fast, but in an aura of peace, is that right?

A. That is right.

Trial Examiner: A friendly fight?

Mr. Weil: Let's trade punches?

The Witness: Yes, that is is right. (R. 124)

* * * *

Q. Throughout your experience with respondent, have you found respondent willing to bargain with you at all times?

A. I would say yes.

Q. Have you found them generally friendly or unfriendly in attitude toward you?

Mr. Weil: I object.

Trial Examiner: Oh, I think I will allow that.

A. Well, let me inquire please, in your question meaning friendly, how do you mean that "friendly or unfriendly"?

Q. That is, willing to agree to any proposals?

A. Yes, I will agree to that question.

Q. Willing to discuss grievances?

A. As near as I can remember, yes.

Q. Arising from the negotiations in 1953, leading to the contract of July 27, 1953, were you able to secure substantial hourly rate increases for the men in the unit?

A. I think they received a fair increase,
yes. ***

(R. 229, 230).

Roy F. Buntin, an employee in the unit and a member of the bargaining committee, called as a witness of the General Counsel, testified:

Q. (By Mr. Weil): During the course of the negotiations, did Mr. Dufford make any statements concerning the company's attitude toward employees who had joined the union?

A. It was, I believe brought out during that meeting and possibly in some of the other meetings —

Q. By "that meeting," you mean the third meeting? A. The third meeting.

A. (Continuing): That his attitude toward the Union employees had changed and was not necessarily the attitude that he would have with other employees not included in the Union.

Trial Examiner: Who said that?

The Witness: Mr. Dufford.

A. (Continuing): He may not have said those exact words. As nearly as I can recall, that is what he said.

Trial Examiner: Which meeting was that?

The Witness: The third meeting. However, I believe that was brought out in several of the meetings, that was brought up, *that he didn't feel that he had the freedom to deal directly with the employees in the unit like he had with other employees, since they were in the Union, that he had to deal with the Union and not directly with the employees, and therefore, his relationship had changed.* (R. 183, 184, emphasis added).

* * *

Q. (By Mr. Smith): Mr. Buntin, on di-

rect examination you said that Mr. Dufford's attitude had changed since the Union was certified as the bargaining agent for the unit in question. Is that correct?

* * *

A. Let's see. As I understand it, I said that his attitude changed in respect to the employees in the unit — I believe, yes, his attitude had changed, I believe I testified that way.

Q. (By Mr. Smith): In what respect had Mr. Dufford's attitude changed?

A. As near as I can remember, *he said that he could not approach the persons in the unit like he could his other employees or like he could the unit employees before they joined the Union; he had to approach the Union as the bargaining agent, he didn't feel free to approach the employees on a personal basis. Words to that effect.*

Q. Would you call such an attitude anti-Union?

* * *

A. The general impression I received was that Mr. Dufford had an unfriendly attitude for some time after the Union was certified.

* * *

Q. (By Mr. Smith): Mr. Buntin, other than the statements you have previously referred to as expressions of Mr. Dufford's attitude — or changed attitude, I should say — did he at any time since certification of the bargaining unit make other statements or expressions which would indicate that his attitude had changed?

A. If I understand this question correctly, that would be after this apparent change of attitude in the third or fourth meeting — is that what you are referring to — or since the absolute certification?

Q. Since the certification.

The Witness: Repeat that question, please.

Trial Examiner: Read the question.
(Question read.)

A. As I understand that, that his attitude might have changed from an unfriendly attitude to a more friendly attitude.

Q. (By Mr. Smith): You say it had changed from an unfriendly attitude to a more friendly attitude?

A. Possibly during the last two sessions of bargaining, there was semblance of a friendly attitude reached.

Q. During bargaining, however, the atmosphere was unfriendly, during the early stages or first few meetings?

A. Probably the most heated argument came during the third meeting. *I don't believe there was any unfriendly argument, possibly, at any other time, and I wouldn't say that that was absolutely unfriendly.*

Q. What was that argument concerning?

A. It was concerning the bonus issue, as I remember, the most heated argument concerned the bonus issue.

Q. Subsequent to negotiations and after the contract had been entered into in 1953, did Mr. Dufford take any action or make any statement which reflected an anti-Union attitude?

A. No, I don't believe he made any statement, as I remember, that reflected an unfriendly attitude.

Q. Has Mr. Dufford ever refused to meet with you at your request or with the bargaining unit which you represent, at your request or Mr. Baldwin's request, to your knowledge?

A. No. The meetings might have been delayed sometimes because he wasn't available

for some reason, but I don't recall of any meeting being refused.

Q. Has Mr. Dufford, to your knowledge, ever refused to discuss any matter involving the terms or conditions of your employment or the Union contract, with you or with the bargaining unit?

A. Not that I recall. (R. 200, 201, 202, emphasis added).

The gist of the above testimony clearly shows that Mr. Dufford was cognizant of the obligations imposed upon him by the Act to bargain with the union as the certified bargaining representative of the employees and not deal with them directly. The record is clear that he was always willing to bargain and did so in good faith. The company never refused to bargain, and although the complaint charged such a refusal (R. 13) the Trial Examiner and the Board properly dismissed that portion of the complaint. The record shows that while some of the negotiation sessions were heated (which certainly is not unusual) the company bargained in good faith and gave substantial concessions, and there was no animosity.

In addition to the above testimony of the company's friendliness the record shows the following which we may call "plus" factors in evaluating the company's motive and feeling:

(1) The granting of a union shop clause in the initial contract. No employer who is seeking to undermine a union and discourage union membership is going to agree to a union shop clause as readily as the company did here.

(2) The speed with which the first contract was negotiated. Negotiations started July 22 and an agreement was reached July 27. This is certainly a record time for an original agreement where each provision must be negotiated from scratch.

(3) The substantial size of the original wage increase, some twenty-six cents or in excess of twenty per cent. To those familiar with labor practice such an increase is certainly larger than the usual.

(4) The willingness of the company to negotiate on the 1954 contract, even though charges had been filed against it by the union. The 1954 negotiations again showed the company's good faith when the company again gave substantial concessions, including the union's requested sick leave and a further wage increase of fifteen cents. (Parenthetically it might be added that the company again bargained in 1955 and agreed with the union to a two year contract which included a twenty cent wage increase and additional holidays. This case was pending before the Board all during that time.)

(5) The lack of grievances or disputes in the administration of the contract (R. 239). While the company does not contend that the employee's failure to use the grievance machinery in the contract to recover claimed bonuses or sick leave bars the Board proceedings or constitutes a defense thereto, we do contend that such failure indicates that the employees knew and believed that the company had no legal or moral obligation to pay the sick leave and bonuses.

(6) The fact that during the entire history

of the relationship between the company and the union there have been no strikes, lockouts, work stoppages, slowdowns or other labor disputes. The company's relationship with the union has certainly been far better than average.

The testimony above and the foregoing plus factors should be viewed and considered in the light of one other factor — *that there is no direct or indirect evidence in the record of any anti-union motive, feeling, or conduct.* There is no background of hostility from which such motive or feeling can be inferred. And the testimony and the plus factors show the exact opposite. The company is entitled to have the conduct complained of viewed in the clear light of its lack of anti-union bias.

The United States Court of Appeals for the Seventh Circuit has recently said:

After a careful perusal of the record, we are convinced that the decision of the Board is clearly erroneous. We think it pertinent to observe that the Board has long pressed upon courts the importance to be attached to a hostile anti-union attitude on the part of an employer in characterizing its acts. This has often been referred to as background, and in innumerable cases has been utilized for concluding that an act by an employer, otherwise innocent, is discriminatory. *Conversely, we think that an employer with a friendly, sympathetic union attitude is entitled to credit in characterizing its acts which in themselves may not be discriminatory.* We doubt if any case has been before this or any other court where there is such an undisputed demonstration of lack of all hostility or anti-union bias. * * * *N. L. R. B. v. Chronicle Publishing Co.* (CA 7th, March 2, 1956)

230 F. 2d 543, 547; 37 LRRM 2632, 2635, emphasis added.

The Board argues that the company's statements during negotiations to the effect that it did not intend to discriminate against the represented employees with respect to bonuses and sick leave evidences bad faith, since those statements were "part of the context in which the employer acted". This position of the Board raises the question of how binding the multitudinous statements made during negotiations will be held to be even though not included in the agreement finally reduced to writing and signed. This question will be discussed under Point No. IV. However, the statement of the Board to the effect that:

It seems unlikely that an employer motivated by no anti-union considerations would deprive only his represented employees of substantial benefits given unrepresented employees and which the former had been led to believe would be continued, without first explaining to them or their representatives why the changes were made (R. 84).

disregards and is contrary to three things which the record clearly shows: (1) that at no time did the company say that the benefits would be continued, but only that they were discretionary with the company and the company would not contractually agree to continue them; (2) that there never was an established sick leave policy prior to the union's 1954 contract; and (3) that the benefits guaranteed to the represented employees by the contract, including wage increases which the others did not receive, were of a considerably greater value than the bonuses.

We submit that dissenting Chairman Leedom was correct in refusing to infer an illegal motive from the statements relied on by the Board. The sick leave issue was not a withdrawal of an established sick leave practice at all, but was rather an improvement in record keeping and the substitution of contract terms for the discretion formerly exercised by the supervisors. The discontinuance of the bonus was explained by the uncontroverted testimony of Mr. Dufford:

Trial Examiner: From your answer, I think probably the question I had in mind has been inferentially answered. However, I will ask it specifically. Why were the employees in the unit not included in the bonuses that were given in 1953.

The Witness: Because we had a contract of employment with those people by which we guaranteed and had to live by the contract which bound us to certain terms with those people, such specific binding agreement not existing with the other people, and by the terms of which contract, we could incur considerable expense. Also due to the fact that there was a possibility that payment of a bonus could, under certain sets of circumstances become a violation of our contract or a violation of the — wait just a minute — that unfair labor charges could be filed against us or conceivably could be filed for payment of a bonus. (R. 269).

This certainly is a reasonable and lawful explanation of what the Board calls totally unexplained disparate treatment.

In conclusion of the argument of Point No. III we submit that it is the duty of the Trial Examiner and the Board to make findings on all of the material

aspects of the case. Certainly the company's motive is an essential part of a discrimination case, as was pointed out under Point No. I of this brief. While an illegal motive may be inferred in a proper case, such a motive cannot reasonably and should not be inferred in the face of direct and uncontroverted evidence of friendliness and non-hostility as appears here. The company was entitled to a finding of friendliness and non-hostility and the Board erred in failing to make such a finding. When viewed in the light of such a finding the company's conduct of which complaint is made clearly loses the taint of illegality which the Board has artificially attached.

POINT NO. IV

THE BOARD ERRED IN ORDERING THE COMPANY TO TAKE CERTAIN ACTION TO REMEDY THE ALLEGED VIOLATIONS OF THE ACT, INCLUDING THE MAKING WHOLE OF ITS EMPLOYEES WHO SUFFERED AS THE RESULT OF NONPAYMENT OF BONUSES AND SICK LEAVE.

The Board, having found that the company violated the Act by discontinuing bonuses and paid sick leave for the employees represented by the union, has ordered the company to make whole those employees who, during the term of the 1953 contract, suffered a loss by reason of the alleged discrimination by paying them the money lost (R. 86).

It is fundamental that the primary purpose of the Act is to promote and encourage the principle of collective bargaining in labor relations. The Board should not, and has not in the past taken a seat at the bargaining table and negotiated a contract for the

parties. The cases are too numerous for citation where the courts have held that while the Act does require an employer to bargain in good faith with the duly authorized representative of his employees it does not require nor can the Board compel the employer to make concessions or to reach an agreement on any given issue.

The union's original contract proposal included requests for specified bonuses (one month's pay) and a specified number of days paid sick leave. (Note that the proposals were not merely for continuation of existing practices). Both proposals were thoroughly discussed during negotiations and rejected by the company, and the union agreed to and signed a contract which did not provide for either. During the following year's negotiations the union again proposed bonus and sick leave provisions. Again both were thoroughly discussed and the company agreed to sick leave provisions and again rejected the bonus proposal. The union again agreed to and signed a contract which did not provide for bonuses, even though it knew the company had not paid bonuses to the unit in 1953.

Clearly what the Board has done in its order is to give to the union the sick leave and bonus provisions it asked for but failed to get at the bargaining table in 1953. The Board attempts to justify this action by referring to "assurances" made early in the negotiations. This causes us to wonder how far a party to collective bargaining negotiations will be bound by any statement made during negotiations which is not later included in the written contract.

We submit that good faith bargaining requires

fluidity of position among the participants. There must be give and take. Statements made and concessions given now give way to others subsequently made in the interchange of proposals which is the very essence of bargaining. It should be noted that the statements of the company relied on by the Board were made early in negotiations, prior to an agreement on wages. It is more reasonable to assume, as did dissenting Chairman Leedom, that any disparity between the company's statements during negotiations and its conduct thereafter was due to the substantial wage increase later agreed upon. Such a lawful explanation is, we submit, more reasonable than the unlawful one inferred by the Board, particularly when viewed in the light of all the other circumstances.

In conclusion of the argument of Point No. IV we submit that the result of the Board's order here is to discourage good faith collective bargaining. Why should a union bargain in good faith on all issues if it can concentrate on wages and then, after getting an increase much greater than may have otherwise been possible, come to the Board and get additional benefits. Such a result does violence to the fundamental purposes of the Act and should not be allowed to stand.

CONCLUSION

In summary we submit:

1. That illegal motive and intent are essential elements of a case of a section 8 (a) (3) violation.
2. That the burden is upon the General Counsel to prove such illegal motive and intent rather than

upon the employer to prove his purity of motive.

3. That although the necessary motive and intent may be inferred from the conduct complained of in a proper case, such an inference cannot and should not be made in the face of express, clear, and uncontroverted evidence of non-hostility and no anti-union bias.

4. That proof of the company's non-hostility and no anti-union bias is clear in this case and the Board erred in failing to make a finding to that effect.

5. That the record does not show that the company had a paid sick leave policy which was denied to the employees in the unit.

6. That the discriminatory treatment complained of is not so patently disparate as to inherently discourage union membership, but rather the benefits guaranteed to the employees in the unit far outweigh any benefits given to the other employees and not to those in the unit.

7. That the order of the Board does not promote the basic purposes of the Act in encouraging collective bargaining, but, on the contrary, it does violence thereto.

The order of the Board is not supported by the record considered as a whole and is contrary to the law. It should be set aside and the Board's request for enforcement should be denied.

Respectfully submitted,

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No. 15035

**In the United States Court of Appeals
for the Ninth Circuit**

INTERMOUNTAIN EQUIPMENT COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE AND ON APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR
RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

Jurisdiction -----	Page 1
Counterstatement of the case -----	2
I. The Board's findings of fact and conclusions of law -----	2
A. The Company assures the Union, during bargaining negotiations, that it will not discriminate against the represented employees with respect to bonuses and sick leave -----	2
B. Following the execution of the collective bargaining agreement, the Company withdraws sick leave benefits and Christmas bonuses from the employees represented by the Union, while continuing to pay them to employees outside the unit -----	7
C. The Board's conclusions -----	9
II. The Board's order -----	10
Question presented -----	10
Summary of argument -----	11
Argument -----	13
The Board's finding that the Company violated Section 8 (a) (3) and (1) of the Act by discontinuing bonuses and sick leave payments to its employees who were represented by the Union while continuing such payments to its unrepresented employees is supported by substantial evidence on the record considered as a whole -----	13
Conclusion -----	22
Appendix -----	23

AUTHORITIES CITED

Cases :

<i>Allis-Chalmers Mfg. Co. v. N. L. R. B.</i> , 162 F. 2d 435 (C. A. 7) -----	14
<i>Armstrong Cork Co. v. N. L. R. B.</i> , 211 F. 2d 843 (C. A. 5), enforcing 103 NLRB 133 -----	14
<i>Bishop, McCormick & Bishop</i> , 102 NLRB 1101 -----	19
<i>General Motors Corp.</i> , 59 NLRB 1143, enforced, 150 F. 2d 201 (C. A. 3) -----	19
<i>General Motors Corp. v. N. L. R. B.</i> , 150 F. 2d 201 (C. A. 3), enforcing 59 NLRB 1143 -----	14
<i>N. L. R. B. v. Appalachian Electric Power Co.</i> , 140 F. 2d 217 (C. A. 4) -----	20
<i>N. L. R. B. v. Nash-Finch Co.</i> , 211 F. 2d 622 (C. A. 8) -----	20
<i>Radio Officers' Union v. N. L. R. B.</i> , 347 U. S. 17 -----	14
<i>Republic Aviation Corp. v. N. L. R. B.</i> , 324 U. S. 793 -----	15
<i>Shell Oil Co.</i> , 77 NLRB 1306 -----	19
<i>Texas Foundries, Inc.</i> , 101 NLRB 1642 -----	19

II

Statutes:

	Page
National Labor Relations Act (61 Stat. 136, 29 U. S. C., Secs. 151, <i>et seq.</i>) -----	1
Section 8 (a) (1) -----	2, 13
Section 8 (a) (3) -----	2, 13
Section 8 (a) (5) -----	9
Section 10 -----	1
Section 10 (e) -----	1
Section 10 (f) -----	1

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RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the Intermountain Equipment Company to review and set aside an order of the National Labor Relations Board (R. 85-87, 64-65)¹ issued against petitioner on December 16, 1955, following the usual proceedings under Section 10 of the National Labor Relations Act (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), herein called the Act. In its answer the Board has requested enforcement of its order. This Court has jurisdiction of the proceeding pursuant to Section 10 (e) and (f) of the Act, the unfair labor practices having occurred

¹ References to portions of the printed record are designated "R." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

in Boise, Idaho, within this judicial circuit.² The Board's decision and order is reported at 114 N. L. R. B. No. 214.

COUNTERSTATEMENT OF THE CASE

I. The Board's findings of fact and conclusions of law

Briefly, the Board found that the Company violated Section 8 (a) (3) and (1) of the Act by withholding from those of its employees who were members of and represented by the Union ³ Christmas bonuses and sick leave benefits which it afforded to unrepresented employees, after having assured the Union in bargaining conferences that it would not treat the two groups disparately in this regard. The evidence upon which the Board based these findings, which is substantially undisputed, is summarized below.

A. The Company assures the Union, during bargaining negotiations, that it will not discriminate against the represented employees with respect to bonuses and sick leave

On June 26, 1953, the Union was certified by the Board as the collective bargaining representative of a unit of the Company's hourly-paid employees, roughly the equivalent of the parts department in the Company's Boise establishment (R. 28, 80; 10-11, 15, 162). On July 3, Frank Baldwin, the Union's secretary-

² The Company, an Idaho corporation, distributes construction equipment in the States of Washington and Idaho. Its operation in Boise, Idaho, the one involved in this proceeding, involves shipments of substantial value across state lines. The Company concedes that it is engaged in commerce within the meaning of the Act (R. 27; 10, 15, 161).

³ General Teamsters, Warehousemen and Helpers Local Union 483.

treasurer, approached Philip Dufford, the Company's vice president and general manager, relative to a collective bargaining agreement (R. 29; 98, 112, 118-119). On three days thereafter the parties held negotiating meetings conducted by Baldwin and two rank-and-file employees for the Union and by Dufford and Ray Fortune for the Company (R. 29; 98, 113-115, 177). Dufford, being inexperienced in labor relations, had asked Fortune, who was in charge of labor relations for another employer, to assist him (R. 29; 114, 120-121, 169-170, 173-174).

The first bargaining meetings were held on July 22 (R. 29; 98, 113, 119). The Union presented the Company with a proposed contract which, among other things, called for a wage increase of about 46 cents an hour, a union shop, a Christmas bonus equivalent to one month's wages, six days of paid sick leave annually, and the retention of "special privileges," such as the coffee break, then being enjoyed by the employees (R. 44, n. 10; 194-198, 212-213, 219-220, 98-99, 115, 121-122, 224). The provisions of this proposed contract were read aloud (R. 98, 178-179, 212, 194). Dufford commented that the proposed 46 cent increase was "a little bit too high" and the Union then reduced its demand to 31 cents (R. 213-214).

At about the third session, the Union brought up its union-shop demand (R. 29; 98-100, 114-116). Dufford at first was opposed to it, but finally agreed to a union-shop provision which would give employees 60 days in which to join (R. 29; 98-100, 103-104, 117, 186-187). The subjects of bonuses and sick leave were then discussed (R. 29; 199).

Although, before 1953, the Company had paid Christmas bonuses for a number of years extending to before 1950, it had never formalized a bonus plan (R. 29, 80; 151, 153, 190-191, 232). The Company considered payment of a bonus to individual employees to be a matter of discretion on the part of management after consideration of a number of variable factors (R. 29-30; 149-151, 267-268). In practice, however, almost all the employees who had been employed for a year or more received a Christmas bonus amounting to approximately one month's wages or salary (R. 30, 80; 141, 153, 175-176, 190-192, 196, 209-210, 219).⁴ With respect to compensated absences because of sickness or for other reasons, the Company likewise had no formalized policy (R. 30; 154-155, 166-167). It usually left the matter of compensation for time not worked to the department heads, who were lenient in such matters and granted time off without loss of pay, not only for sickness, but also to permit the employees to run errands or to take advantage of the hunting season (R. 30, 80; 154-155, 166-167, 172-173, 176, 192-193, 197-198, 246-247).

As previously noted, the Union was asking for a contract provision for six days' paid sick leave and for the payment of a Christmas bonus equivalent to a month's wages. Dufford objected to both provisions (R. 30). He objected to the sick leave provision on the ground that if it were put into the contract the

⁴ The head of the parts department told an applicant for employment who was dissatisfied with the Company's wage scale that the employees received an annual bonus of approximately a month's wages (R. 209-210, 219). The applicant then took the job (R. 209-210).

employees would take sick leave whether or not they were sick (R. 30-31, 80; 99, 180, 214-215). He asked why the Union wanted sick leave in the contract and asked if the employees were not satisfied with the way the Company had handled sick leave in the past (R. 31; 215). One of the employee representatives replied that he had never taken sick leave but that he understood from the other employees that the sick leave practice had been satisfactory (*ibid.*). Dufford said that he was "proud" of the Company's sick-leave record, and pointed out that one employee who had been absent for an extended period because of polio had never been docked (*ibid.*). Baldwin asked if he would change the policy, and Dufford replied that he saw nothing in the near future that would justify changing the policy (*ibid.*). Dufford also assured the Union that in paying employees for sick leave, the Company would not discriminate against the employees in the bargaining unit (R. 31, 81; 100, 139, 181-182, 184, 263-266).

The discussion then shifted to the bonus clause. Dufford opposed this on the ground that the Company had no set policy regarding bonus payments; that they were strictly the prerogative of management; that the Company had never had any written bonus arrangement with any employee; and that if he agreed to put a bonus provision in the contract, the Company would have to pay a bonus whether or not the Company showed a profit and whether or not it paid one to the unrepresented employees (R. 31-32, 80; 99, 122, 142, 181-182, 216, 234). On several occasions during the negotiations, however, he assured the Union that the

Company had no intention of changing its bonus policy and would not discriminate between employees in the unit and employees outside the unit in paying a bonus (R. 32-33, 50-51, 81; 100, 124-125, 146, 182, 184, 263-266). Fortune commented that the company he represented paid bonuses to monthly-paid employees, such as those outside the unit in this case, but not to hourly-paid employees such as those in the unit (R. 32; 145, 182). Dufford said that the Company had never discriminated between these groups of employees with respect to the bonus (R. 32; 182). Baldwin expressed some concern that this practice might change and that employees outside the unit would be paid bonuses while those in the unit would not (R. 32; 100, 182, 220-221). Dufford said that it was not his intent to discriminate (R. 32, 81; 182, 184, 263-266).

Fortune assured Baldwin that Dufford would do what he said he would do (R. 33; 101, 185, 217). Baldwin took this to mean that Dufford's assurance about nondiscrimination could be relied upon and that the Company would continue to handle sick leave and bonus payments in the same manner as in the past (R. 33; 133-134). He called the two employee representatives out of the room for a conference and asked if they had always received a bonus and if the Union should take Dufford's word that the Company's policy would remain the same (R. 33; 101, 126, 131, 182, 217, 222). One of the employees, who had been with the Company for nearly five years, said that he had always received a bonus and that, as far as he knew, Dufford's word was good (R. 33; 101, 126, 131, 175, 182, 217). The other concurred (R. 33; 101, 131, 217).

Expecting a continuance of past practices with respect to bonuses and sick leave, the union negotiators returned to the meeting room and, without again mentioning the subject of bonuses and sick leave, began negotiating on wages (R. 33, 81; 101-102, 182). They agreed upon a wage increase of 26 cents an hour (R. 235). Except for the hourly rate increase the contract apparently did not provide benefits not previously enjoyed (R. 50; 103-108, 242-251).

After the parties had reached agreement on the terms of the contract on July 27, the union committee tendered the agreement to the employees in the unit with an explanation of what had been said about bonuses and sick leave (R. 33-34, 81; 103-109, 129-130, 187-190, 204-205). The employees approved the contract (R. 34; 130, 190).

After the execution of this contract, the Company reduced the hours of work for the employees in the bargaining unit from 47 to 40 hours a week, thereby eliminating substantial overtime payments to the represented employees (R. 50; 104, 106, 234-235, 251-253). As a result, their take-home pay was no greater than before and in some instances, at least, was slightly less (R. 50; 255-258). Many of the unrepresented employees, moreover, received individual merit increases and no such increases were received by the represented employees (R. 50; 238-239, 251).

B. Following the execution of the collective bargaining agreement, the Company withdraws sick leave benefits and Christmas bonuses from the employees represented by the Union, while continuing to pay them to employees outside the unit

Shortly after the Union's certification by the Board, the Company had a time clock installed for the em-

ployees in the unit (R. 34; 158, 170-171). Following the execution of the collective bargaining agreement in July 1953, the Company, without notifying the Union, instructed the supervisors of the employees in the unit that they should adhere strictly to the contract and not give the employees anything except that which was guaranteed by the contract (R. 34, 81; 157, 165, 109-110). As a result, only the time shown as worked by the clock was paid to the employees in the unit, and their absences due to sickness and other causes were no longer approved for compensation (R. 34, 81; 154, 156-157, 159-160, 176-177, 192-193, 210-211). Employees outside the certified unit were not required to punch the time clock and their supervisors were not instructed to make any change in the practice of compensating employees for absences due to illness or other causes (R. 34; 159, 172). Accordingly, the Board and Trial Examiner concluded that the practice of giving paid sick leave continued with respect to employees outside the certified unit (R. 34, 81).

In December of 1953, the Company, again without notifying the Union, decided to pay a Christmas bonus to the unrepresented employees but not to employees within the unit (R. 34, 81; 12, 17, 225-226, 267-268). After the bonus was paid to employees outside the unit, the Union had two meetings with the Company during which that subject was discussed (R. 35; 12, 17, 126-127, 226-227). Dufford expressed concern over how the Union found out who received a bonus and who did not, and the Company "took the position * * * it was a company prerogative, and if they wanted to pay them, they would * * * and that was

that'' (R. 126-129). On January 4, 1954, Baldwin telephoned Dufford that he understood "some of the boys * * * had been docked for the sick leave" and asked whether the Company was going to pay it (R. 35; 110). Dufford "still took the position that was the Company's prerogative" (*ibid.*). The 1953 bonus was never paid to employees in the bargaining unit (R. 35; 12, 17). When the parties negotiated a new contract in 1954 a provision for sick leave, but not for bonuses, was agreed to (R. 35; 154, 167-168, 229, 239-240).

C. The Board's conclusions

The Board (with Chairman Leedom dissenting) found, in agreement with the Trial Examiner, that under the circumstances outlined above, the Company's disparate treatment, concerning bonuses and paid sick leave, in favor of unrepresented employees and to the detriment of employees in the bargaining unit "had the inherent effect of discouraging union membership and, therefore, constituted a violation of Section 8 (a) (3) and (1) of the Act" (R. 81, 56-58). The Board stated that the Company "must be held to have intended this foreseeable consequence of its conduct" and that, moreover, "the inference that the [Company] intended to discriminate because of union membership is buttressed by the circumstances" (R. 83, 84). The Board, however, dismissed that part of the complaint alleging that the Company's conduct regarding bonuses and sick leave violated Section 8 (a) (5) of the Act, on the ground that before the contract was executed, the parties had agreed

that such matters might remain within the Company's unilateral administration (subject to the assurances that it would not discriminate against the employees in the unit) and that, in any event, the Union was given an opportunity to negotiate on the matter after the bonus was given (R. 87, 37-42).

II. The Board's order

The Board's order (R. 85-87, 64-65) requires the Company to cease and desist from the unfair labor practices found, and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their statutory rights. Affirmatively, the Company is required to make whole those employees who, during the term of the 1953 contract, suffered a loss as the result of the Company's discrimination against them; and to post appropriate notices.⁵

QUESTION PRESENTED

Whether substantial evidence on the record considered as a whole supports the Board's finding that the Company violated Section 8 (a) (3) and (1) of the Act by discontinuing bonus and sick leave payments to its employees who were represented by the

⁵ Bonuses are to be calculated on the same nondiscriminatory basis that the Company used in determining whether or not employees outside the unit should receive a bonus for that year (R. 58-59, 86). Sick leave is to be paid on the same nondiscriminatory basis used in paying sick leave to employees outside the unit (R. 59-60, 86). However, since the contract required employees to assert claims for wages within 30 days of the time they accrued, back sick leave is to be paid only for the period after January 4, 1954, the first notice to the Company of any claim to compensation for sick leave (R. 59-60, 86; 109-110).

Union while continuing such payments to its unrepresented employees.

SUMMARY OF ARGUMENT

There is substantial evidence on the record considered as a whole to support the Board's finding that the Company discriminated against its represented employees, in discontinuing the payment of sick leave and year-end bonuses to them, to discourage membership in the Union, thereby violating Section 8 (a) (3) and (1) of the Act.

While recognizing that an employer does not necessarily violate the Act merely by paying to his unrepresented employees benefits which he withholds from his represented employees, the Board was warranted in finding under the particular facts of this case that the Company had unlawfully discriminated against its represented employees. Since the Company, with full knowledge of all the Union's contract demands, had assured the Union during bargaining negotiations that it would not discriminate between its represented and its unrepresented employees in the payment of year-end bonuses and sick leave, thereby causing the Union to drop its demands for contractual provisions covering those items, the Board properly found that the Company's subsequent payment of such benefits to its unrepresented employees and withholding of such benefits from its represented employees, without giving them any reason for such disparate treatment, had the inherent effect of discouraging union membership.

Where, as here, the employer's conduct has the inherent effect of discouraging union membership, no specific proof of an intent to discourage union membership is necessary, for an employer is presumed to intend the foreseeable consequences of his conduct.

The Board properly rejected the Company's contention that its disparate treatment of the two groups was warranted because under its contract with the Union it "could" incur considerable expense which it was not obligated to incur on behalf of its unrepresented employees. In the first place, the record does not establish that the Company in fact incurred any added expense in behalf of its represented employees by reason of the contract which it did not incur in behalf of its unrepresented employees. A mere potential inequality of advantages, even in the absence of the Company's assurances to the Union during bargaining conferences, would not warrant the Company's discontinuance of the benefits only to the represented employees, for such disparate treatment inherently discourages union membership. In the second place, even if the Company had not in other ways balanced the contract advantages with other advantages to its unrepresented employees, it nevertheless would not have been warranted in giving disparate treatment to these two groups in respect to bonuses and sick leave, for during the bargaining negotiations, with full knowledge of all the Union's contract demands, it had assured the Union that it had no intention of discriminating or otherwise changing its policy with respect to the payment of these benefits, thereby causing the employees to accept a contract

which did not mention these benefits. In view of these assurances, the effect of the Company's subsequent disparate treatment of the two groups was to cause the represented employees reasonably to believe that the Company was punishing them for their union adherence, a result that necessarily discourages union membership.

ARGUMENT

The Board's finding that the Company violated Section 8 (a) (3) and (1) of the Act by discontinuing bonuses and sick leave payments to its employees who were represented by the Union while continuing such payments to its unrepresented employees is supported by substantial evidence on the record considered as a whole

The Board's finding that the Company's disparate treatment of its represented and unrepresented employees with respect to the continuation of paid sick leave and year-end bonuses amounted to unlawful discrimination against the represented employees was based upon the particular facts of this case and not upon any assumption that an employer may never grant benefits to unrepresented employees which it withholds from its represented employees (see cases cited, *infra*, pp. 19-20). In this case, as the Board noted (R. 80-81), the Company assured the Union during bargaining negotiations that it would not discriminate against the represented employees with respect to bonuses and sick leave. As a result, the Union dropped its demands for contractual provisions covering those items and passed on to the employees the Company's assurances. After the contract was signed, however, the Company, without explanation to the employees or discussion with the Union, sum-

marily deprived the represented employees of bonuses and paid sick leave while continuing such benefits for the employees not covered by the contract.

Under the circumstances, the Board properly concluded that the effect of this disparate treatment, in view of the Company's previous assurances that all the employees would be treated alike, was to cause the represented employees reasonably to believe that the Company was punishing them for their union adherence, a result that necessarily discourages union membership (R. 83). In comparable situations the Board and the courts have uniformly held the employer's disparate treatment to be in violation of Section 8 (a) (1) and (3) of the Act. *General Motors Corp. v. N. L. R. B.*, 150 F. 2d 201 (C. A. 3), enforcing in pertinent part 59 N. L. R. B. 1143, 1144-1145, 1153; *Armstrong Cork Co. v. N. L. R. B.*, 211 F. 2d 843 (C. A. 5), enforcing 103 N. L. R. B. 133, 134-138; *Allis-Chalmers Mfg. Co. v. N. L. R. B.*, 162 F. 2d 435, 440 (C. A. 7).

In finding unlawful discrimination against the represented employees, no specific proof of the Company's motivation was necessary, for, as the Board stated (R. 81, 56-57), the disparate treatment had the inherent effect of discouraging union membership and the Company must be held to have intended this foreseeable consequence of its conduct. As the Supreme Court said in *Radio Officers' Union v. N. L. R. B.*, 347 U. S. 17, 45:

This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is

but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct.

Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage [or discourage] is sufficiently established.

See also, *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793, 795, 805.

The assurances made by the Company at the bargaining conferences that it had no intention of discriminating between represented and unrepresented employees were, as the Board pointed out (R. 83), "part of the context in which the employer acted and cannot be ignored in deciding whether his disparate action had the natural consequences of discouraging union membership whether the statements were made in all sincerity or not." The Company's action following the bargaining conference, however, indicates that these statements were not made in all sincerity and buttresses the inference that the Company intended to discriminate because of union membership. For, as the Board noted (R. 84), "immediately after signing the contract the [Company] deprived the represented employees of their paid sick leave. The immediacy of its action, totally unexplained, would give rise to an inference that the [Company] intended to discriminate because of union membership. While

several months elapsed before the disparate bonus payments, in the light of the prior action on the sick leave, and the absence again of any explanation to the employees, the same inference could be drawn. It seems unlikely that an employer motivated by no antiunion considerations would deprive only his represented employees of substantial benefits given unrepresented employees and which the former had been led to believe would be continued, without first explaining to them or their representative why the changes were made. The failure to discuss or explain before acting contrary to its prior statements casts serious doubts on the bona fides of the [Company's] actions and the purity of the motive behind them."

The only explanation offered the employees or their representative when they protested the discriminatory treatment was that the Company was exercising its management prerogatives (R. 35; 127, 129). Before the Board, however, the Company sought to defend its action by contending (1) that under its contract with the Union it "could" incur considerable expense which it was not obligated to incur on behalf of unrepresented employees; and (2) that if the Company had unilaterally paid a bonus to the represented employees, an unfair labor practice charge "conceivably could be filed" (R. 49; 268-269). The Board properly rejected both these contentions.

The Company's attempted justification for its action on the ground that it "could" have incurred considerable expense under its contract was rejected by the Board for several reasons (R. 49-54). In the first place, as we have already shown (*supra*, p. 7), the

Company did not establish that it in fact incurred any added expense in behalf of its represented employees by reason of the contractual provisions which it did not incur in behalf of its unrepresented employees. The increase in the hourly rate of pay was apparently the only contract item which could have resulted in additional cost to the Company and this was offset by the Company's elimination of 7 hours a week of overtime work at time and a half pay which its represented employees had been regularly receiving. Moreover, unlike the unrepresented employees, they received no individual merit increases. To be sure, if the Company had not eliminated the 7 hours a week of overtime work for its represented employees or had not given the individual merit increases to its unrepresented employees, it might have incurred additional expense under its contract for its represented employees which it would not have incurred for its unrepresented employees. This mere potential liability, however, even in the absence of the Company's assurances to the Union during the bargaining conferences that it would not discriminate against its represented employees in paying sick leave and bonuses, would not warrant the Company's discontinuance of these benefits to its represented employees while continuing them as to its unrepresented employees. Such disparate treatment inherently discourages membership in the Union.

In the second place, even if the Company had not in other ways balanced the contract advantages with other advantages to its unrepresented employees, it nevertheless would not have been warranted in giving

disparate treatment to these two groups in respect to bonuses and sick leave, for it had assured the union representatives during the bargaining negotiations that it had no intention of discriminating or otherwise changing its policy with respect to the payment of these benefits. On the basis of such assurances, the employees and their representatives were willing to leave to management's discretion the amount of sick leave and bonuses to be granted alike to all the employees. Furthermore, these assurances were given after the Company knew that the Union was seeking substantial wage increases and other benefits and did not purport to be in lieu of other concessions. Thus, at the first bargaining conference, the Union had submitted and the Company had read a proposed contract calling for a wage increase of 46 cents an hour, a union shop and the retention of "special privileges" (such as the coffee break), in addition to a Christmas bonus equivalent to one month's wages and six days of paid sick leave (*supra*, p. 3). Before any detailed discussion of the bonuses and sick leave occurred, the Company had commented that the proposed 46-cent wage increase was "a little ^{bit} too high" and had caused the Union to reduce its demand (R. 213-214). And within a week, the parties had signed the bargaining agreement. Accordingly, it can hardly be said that when the Company assured the Union it would not discriminate between the represented and unrepresented employees with respect to bonuses and sick leave, it had not contemplated granting the represented employees other substantial benefits. In these circumstances, the Board properly concluded that the

effect of this disparate treatment “was to cause the represented employees reasonably to believe that the [Company] was punishing them for their union adherence, a result that necessarily discourages union membership” (R. 83).

The Company’s final asserted defense—that it was warranted in withholding the paid sick leave and bonuses from its represented employees while continuing to pay sick benefits and bonuses to its unrepresented employees because its unilateral payment of such benefits to the represented employees might conceivably have resulted in the filing of unfair labor practice charges—is plainly without merit. Aside from the fact that prior Board decisions furnished no basis for a belief that such payments could constitute an unfair labor practice,⁶ it is elementary “that an employer may not commit unfair labor practices in order to avoid possible unfair labor practice charges.” *General Motors Corp.*, 59 N. L. R. B. 1143, 1156, enforced, 150 F. 2d 201 (C. A. 3).

As previously stated, it is not the Board’s position that any grant of benefits by an employer to his unrepresented employees which he withholds from his represented employees is necessarily unlawful discrimination against the latter. Indeed, the Board expressly recognized in this case that “an understanding that the bonus might be distributed unequally in order to balance any unequal advantages acquired under the contract might be presumed” under other circumstances (R. 49–50). In *Shell Oil Co.*, 77 N. L.

⁶ See *Texas Foundries, Inc.*, 101 N. L. R. B. 1642, 1671; *Bishop, McCormick & Bishop*, 102 N. L. R. B. 1101, 1102.

R. B. 1306, 1309-1310, for example, the Board held that the employer did not unlawfully discriminate against his represented employees when he granted substantial wage increases to his unrepresented employees while denying the union's request that similar increases be given to the represented employees because at the time of the union's request it was engaged in bargaining with the employer for much higher stakes and it did not appear that the employer was unlawfully motivated in according the employees unequal treatment. See also *N. L. R. B. v. Appalachian Electric Power Co.*, 140 F. 2d 217, 219 (C. A. 4) where the employer, similarly, was held to have acted lawfully in granting a wage increase to unrepresented employees while temporarily withholding it from his represented employees pending contract negotiations; and *N. L. R. B. v. Nash-Finch Co.*, 211 F. 2d 622 (C. A. 8), holding that the employer acted lawfully in discontinuing bonus and insurance benefits to its represented employees only, where the union bargained these benefits away in exchange for wage increases and other benefits and agreed to the contract with notice that the employer intended to withdraw such benefits.⁷

⁷ Indeed, the General Counsel who issued the complaint in this case refused to issue a complaint in two administrative decisions cited by petitioner at pp. 21-23 of its brief, where under different circumstances bonuses were granted to unrepresented employees and withheld from represented employees. In neither of those cases did the employer, as here, assure the union during bargaining negotiations that it would not discriminate between its represented and its unrepresented employees in the payment of bonuses. Moreover, in those cases, unlike in the instant case, the unrepresented employees had received no other advantages which tended to equalize the increases given to the represented employees.

In this case, however, the Union did not bargain away the bonuses and paid sick leave in exchange for other benefits and at the time it signed the contract had been assured by the Company that it would not discriminate between the represented and the unrepresented employees in the payment of bonuses and sick leave. At the bargaining conferences, the issue as to both sick leave and bonuses was not whether they should be continued or discontinued but whether a fixed amount should be guaranteed or the amount left, as in the past, to the discretion of management. The Company had assured the Union not only that it had no intention of discriminating between represented and unrepresented employees but also that it had no intention of changing its past practice with respect to paying these benefits (*supra*, pp. 4-6). Moreover, as already pointed out, when these assurances were given, the Company had already been put on notice of all the Union's contract demands and there is no basis for assuming that the assurances were meant to be in lieu of any of the provisions of the contract concluded shortly thereafter.

As the Board stated (R. 53), if an employer were free to discriminate between unrepresented and represented employees in continuing or discontinuing benefits on the ground that the contract covering the represented employees failed to guarantee continuance of those benefits, "he could with impunity deprive employees represented by a union of everything provided before the union became the chosen representative which improved working conditions while at the

same time continuing to provide such things for employees not so represented so long as nothing in the union contract provided therefor. So he might remove drinking fountains, washing facilities, work stools, adequate lighting, and many other improvements or conveniences from departments of employees represented by a union while continuing to provide the same thing for other employees." Such beneficial working conditions, like the bonuses and paid sick leave in this case, may be discontinued by the employer but if he does continue them he must do so on a nondiscriminatory basis. His elimination of such benefits only to the represented employees has the natural tendency to discourage union membership and is a violation of Section 8 (a) (3) and (1) of the Act.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition to review should be denied and that the Board's order should be enforced in full.

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AUGUST 1956.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or

may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the

Board. No objection that has not been urged before the Board, its members, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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The first part of the book is devoted to a general survey of the history of the world, from the beginning of time to the present day. The author discusses the various stages of human civilization, from the primitive state of nature to the establishment of the first societies, and the progress of science and art. He also touches upon the different religions and philosophies that have shaped the human mind, and the various forms of government that have been tried. The second part of the book is a detailed account of the history of the British Empire, from its early beginnings in the sixteenth century to its present extent. The author describes the various colonies and territories that have been acquired, and the different policies that have been pursued towards them. He also discusses the various wars and conflicts that have been fought, and the role of the British Empire in the world. The third part of the book is a critical examination of the present state of the world, and the prospects for the future. The author discusses the various social and economic problems that are facing the world, and the different theories and proposals that have been put forward to solve them. He also touches upon the role of the individual in society, and the responsibilities that are placed upon him. The book is written in a clear and concise style, and is well illustrated with numerous examples and references. It is a valuable work for anyone who is interested in the history of the world, and the progress of human civilization.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERMOUNTAIN EQUIPMENT COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION TO REVIEW AND SET ASIDE
A DECISION AND ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF OF PETITIONER
INTERMOUNTAIN EQUIPMENT COMPANY

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FILE
AUG 28 1955

INDEX

CASES CITED

	PAGE
Anheuser-Busch, Inc. (N.L.R.B. 1955) 112 N.L.R.B. No. 91, 36 LRRM 1086.....	6
N.L.R.B. vs. Jones and Laughlin Steel Corporation (U. S. Sup. Ct. 1937).....	4, 7
N.L.R.B. vs. Nash Finch Company (CA 8th 1954) 211 F. 2d 622.....	6
Radio Officers Union vs. N.L.R.B., 347 U.S. 17.....	6

TEXTS CITED

1 LRRM at page 713.....	4
36 LRRM 1086.....	6
36 LRRM 1088.....	7
112 N.L.R.B. No. 91.....	6

IN THE
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INTERMOUNTAIN EQUIPMENT COMPANY

It is the purpose of the petitioner in this reply brief to call to the Court's attention certain inaccuracies of the factual statements contained in the brief of the respondent National Labor Relations Board. The Board asserts that the contract negotiated between the company and the union, except for an hourly wage increase, did not provide benefits to the employees covered thereby which they had not previously enjoyed (Respondent's brief, page 7). This, of course,

is not true. The contract, in addition to an increase in wages provided for (1) overtime after eight hours in any one day; (2) guaranteed paid vacations; (3) six paid holidays with the provision for pay at time and one-half for work performed on holidays, with the further provision that holidays not worked should count as time worked for purposes of computing weekly overtime; (4) and the further benefits of union security, seniority provisions, and grievance processing machinery, none of which benefits had been guaranteed prior to the contract and none of which benefits has ever been guaranteed to those of the company's employees not in the unit even to the present date.

The Board asserts that many of the unrepresented employees received individual merit increases and no such increases were received by the represented employees (Respondent's brief, page 7). The record does not support this assertion. It should be noted that the contract covering the employees in the unit provides for an automatic increase of twenty cents per hour for all employees in the unit after a six months probationary period (R. 106). There is no evidence in the record to support the Board's assertion that many of the unrepresented employees received merit increases, whereas the represented employees did not receive such increases. This assumption is actually contrary to the facts, as several of the employees in the unit have received merit increases, and it should be noted that the contract establishes minimum rates and expressly recognizes that the employees covered thereby may receive more than those minimums. (R. 104).

The gist of the Board's argument seems to be that the alleged violation of the act consists not in the fact that the employees in the unit were treated differently than those employees not in the unit with regard to bonuses and sick leave, but in the fact that the company failed to give the employees in the unit any reason for such disparate treatment (Respondent's brief, page 11). It seems to us that this argument of the Board suggests something in the nature of a "refusal to bargain". However, it should be noted that although the company was originally charged with refusing to bargain in violation of Section 8 (a) (5) of the Act, the Trial Examiner expressly found that there had been no such refusal and accordingly dismissed that portion of the complaint (R. 61, 63). The Board places great emphasis on the alleged assurances of the company during negotiations that the company would not discriminate between those of its employees within and without the unit and states that these alleged assurances induced the union to drop those demands for contractual provisions covering bonuses and sick leave. This argument sounds like something akin to fraud in the inducement and again appears to be an indirect way of accusing the company of a refusal to bargain even though the Trial Examiner found and the Board affirmed that there was no such refusal.

What the Board obviously is doing in this case is to obtain for the employees in the unit benefits which the union failed to obtain for those employees at the collective bargaining table. This we submit the Board cannot lawfully do. The Act does not re-

quire and the Board cannot compel parties to collective bargaining negotiations to reach agreements on any given issue or set of issues. As Chief Justice Hughes said in speaking for the United States Supreme Court in the case of *N.L.R.B. vs. Jones and Laughlin Steel Corporation* (U. S. Sup. Ct. 1937) 31 U. S. 1:

“The Act does not compel agreements between the employers and employees. It does not compel any agreement whatever. It does not prevent the employer from ‘refusing to make a collective contract and hiring individuals on whatever terms’ the employer ‘may by unilateral action determine’ ***”. (Ibid 1 LRRM at page 713).

The Board argues that the company did not in fact establish that the contractual provisions caused it added expense or provided added benefits to the employees covered thereby, which expense and benefits did not run to the company’s unrepresented employees. The Board further argues that the effect of the twenty-six cents an hour wage increase granted to the employees in the unit was nullified by a reduction in the number of hours worked per week. This argument is so absurd in the face of fundamental economic principle that we wonder if the Board can make the same in good faith. It seems reasonably clear that an employer suffers an economic burden just as clearly when he pays the same amount of money for less work as when he pays more money for the same amount of work. In other words, an employer’s labor cost increases if he reduces the number of hours worked while maintaining the same take-home pay

just as clearly as his labor cost increases when he increases the take-home pay while maintaining the same number of hours worked. Unless there is a corresponding increase in productivity(and the record is devoid of such a suggestion) the company here suffered an economic burden when it granted a twenty-six cents an hour increase even though the work week was subsequently reduced.

Contrary to the Board's assertion there is no evidence in the record to show that the employees not in the unit benefited by a reduced work week. On the contrary the record shows that there was no such reduction in the work week of many, if not most, of the employees not represented by the union.

The Board brushes aside as being without merit the company's contention that conceivably it could have been guilty of an unfair labor practice had it paid its represented employees bonuses in addition to the benefits spelled out in the contract. Since the Act makes it just as much a violation to *encourage* as to *discourage* union membership, and since the Board argues that the disparate treatment with regard to bonuses inherently must discourage union membership, then to be consistent the Board must also take the position that if the company had paid bonuses to all of its employees in the unit and had not paid bonuses to those of its employees not in the unit, the company would thereby be guilty of a violation of Section 8 (a) (1) and (3) of the Act because such conduct would inherently *encourage* those unrepresented employees to join the union.

We submit that the record is clear in this case (contrary to the Board's assertion, Respondent's brief page 20, footnote) that the unrepresented employees received no benefits or promise of benefits which tended in any degree to equalize the increases granted to the employees in the unit by virtue of the contract. We submit that this case is on all fours with the facts in the case of *N.L.R.B. vs. Nash Finch Company* (CA 8th 1954) 211 F.2d 622, and is not distinguishable as the Board suggests.

We should further like to call to the attention of this Honorable Court the fact that heretofore the Board has had no difficulty in justifying disparate treatment between various collective bargaining units of employees as distinguished from disparate treatment of employees within the same unit. Indeed the Board has explained the decision of the United States Supreme Court in *Radio Officers Union vs. N.L.R.B.*, 347 U. S. 17, in this manner. In its decision in the case of *Anheuser-Busch, Inc.* (N.L.R.B. 1955) 112 N.L.R.B. No. 91, 36 LRRM 1086, the Board said in referring to the *Radio Officers* case:

"It is this specific application of the general principles enunciated by the Supreme Court that is most significant. In stating that 'specific proof of intent is unnecessary where an employer's conduct inherently encourages or discourages union membership,' the Court, it seems plain, was mindful of factual circumstances where disparity of treatment *inherently* encourages or discourages union membership. In *Gaynor*, for example, the payment of different wages to union employees doing a job than to nonunion employees doing the *same job* obviously

had that reasonably foreseeable effect. Where, however, the employer's conduct does *not* 'inherently' encourage or discourage union membership, it seems clear to us that the necessity for independent evidence of discriminatory motivation is *not* obviated, and in the light of this, the Court's statement that 'Congress intended the employer's purpose in discriminating to be controlling' becomes significantly meaningful." (36 LRRM at page 1088).

It seems to us that where all of the employees in the unit are treated alike even though employees in a different unit (or who could not properly come within the unit) are treated differently, this disparate treatment cannot properly be characterized as an unfair labor practice in the absence of some showing of an unlawful motive or intent. To hold otherwise is to say that an employer's intent is unimportant in discrimination cases, which in turn requires the overruling of well established law to the contrary.

The Board's decision in this case, and its argument in its brief in support thereof, as it pertains to bonuses and sick leave is in our opinion contrary to the Jones and Laughlin case, *supra*; and further, to sustain such doctrine as enunciated by the Board is to establish a precedent that the Board may make a contract for the parties. It must be remembered that the Trial Examiner found that there was no agreement, oral or otherwise, to pay bonuses and sick leave. Further, no extrinsic evidence of unfair conduct on the part of the employer. The sole basis for the Board holding as it did was that the act of not giving bonuses and sick leave in and of itself was in violation of the Act.

Simply stated, in the express absence of an agreement between the parties as to bonuses and sick leave, the Board has written that provision for the parties. Even though it has written it indirectly, nevertheless for all practical purposes it has written a portion of the contract for the parties.

We say that the Board cannot write a contract for the parties or compel the parties to agree to any provisions of a contract, directly or indirectly.

We submit that upon the record there is no evidence of any unlawful intent on the part of the company, and the conclusion of the Board that the company's disparate treatment inherently discouraged union membership is unwarranted and improper.

The order of the Board should be set aside and the Board's request for enforcement should be denied.

Respectfully submitted,

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In The
United States Court of Appeals
For the Ninth Circuit

PHILIP CARL ORNELAS,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S ANSWERING BRIEF

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FILED

MAY 17 1956

SUBJECT INDEX

	PAGE
Statement of the Case.....	1
Argument.....	3
Conclusion.....	19

TABLE OF AUTHORITIES CITED

Cases, Texts and Statutes

Cases

Bowen v. United States 192 F.2d 515 (CA 5th - 1951).....	16
Burton v. United States, 151 F.2d 17.....	12
Ex Parte Dela, 25 Nev. 353, 60 Pac. 220, 83 Am. St. Rep. 603.....	9
Hastings v. United States, (9 Cir.) 184 F.2d 939.....	15
Howell v. United States, (4th Cir.) 172 F.2d 213.....	14
People v. Erno (Cal.), 232 Pac. 710, Syll. 7 and 9.....	11
Pullian v. United States, (10 Cir.) 178 F.2d 777.....	14
Smith v. United States 187 F.2d 192 (CA D. C. 1950)....	16
State v. Hing, 16 Nev. 307.....	8
State v. Millain, 3 Nev. 409.....	8
State v. Munios, 44 Nev. 353, 195 Pac. 806.....	7
State v. Thompson, 12 Nev. 140.....	8, 9
State v. Wong Fun, 22 Nev. 336, 40 Pac. 95.....	9, 10
Taylor v. United States (4 Cir.) 177 F.2d 194, 195.....	15
United States v. Bremer, 207 F.2d 247 (CA 9th, 1953)....	18
United States v. Haywood, 208 F.2d 156 (CA 7th, 1953)...	15
United States v. Jonikas, 197 F.2d 675 (CA 7th, 1952).....	14
United States v. Moore, 166 F.2d 102 (CA 7th - 1948).....	17, 18
United States v. Rosenberg, (2 Cir.) 200 F.2d 666, 668.....	16
United States v. Walker, 197 F.2d 287 (CA 2d, 1952)13, 16	

Texts

40 C.J.S. 861, Sec. 15.....	11
40 C.J.S. 1038, Sec. 148.....	10

Statutes

Nevada Compiled Laws, 1929	
Section 1066	7
Section 10849.....	7
United States Code, Title 18	
Section 1111	12
Rule 58, Federal Rules of Criminal Procedure.....	11

In The
**United States Court of Appeals
For the Ninth Circuit**

No. 15,036

PHILIP CARL ORNELAS,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S ANSWERING BRIEF

STATEMENT OF THE CASE

A jury returned a verdict finding appellant guilty of murder in the second degree upon the following indictment:

"THE GRAND JURY CHARGES:

That on or about February 12, 1954, at the Reno Indian Colony, within Indian country, near the easterly limits of the City of Reno, County of Washoe, State and District of Nevada, and within the jurisdiction of this Court, PHILIP CARL ORNELAS, alias Phillip Carl Molina, defendant above-named, he being then and there an Indian, did, with malice aforethought, but without premeditation, murder one Daisy Morgan, she then and there being another Indian, in violation of Section 1153, Title 18, United States Code."

To better understand the position asserted by appellant, it becomes necessary to review the record of the proceedings in the District Court.

Case No. 12,651

March 31, 1954—The appellant waived prosecution by indictment, and an information, in the language of the indictment aforesaid, was filed by the United States Attorney. (R. pg. 3).

April 5, 1954—Upon motion of the United States Attorney, Case No. 12,651 was dismissed by order of the court. (R. pg. 5).

Case No. 12,656

April 2, 1954—The indictment set out aforesaid, returned by the Grand Jury, was filed with the clerk. (R. pg. 4).

April 5, 1954—The appellant was arraigned and entered a plea of guilty to the indictment. (R. pg. 5).

April 21, 1954—Upon motion by appellant, the Court ordered that the plea of guilty entered by the appellant be vacated and set aside. The appellant then entered a plea of "not guilty" to the indictment. (R. pg. 6).

June 17, 1954—Following a trial which commenced June 14, 1954, the jury returned a verdict finding appellant guilty of murder in the second degree. (R. pg. 10).

July 26, 1954—Appellant was sentenced to life imprisonment. (R. pg. 11).

May 16, 1955—Appellant filed his motion to vacate and set aside judgment and sentence, under the provisions of Title 28, U.S.C., Sec. 2255. (R. pg. 14).

December 16, 1955—Opinion and order of the Court denying appellant's motion to vacate and set aside judgment and sentence was filed. (R. pg. 34).

The appellant now appeals from the order denying his motion to vacate and set aside judgment and sentence. (R. pg. 48).

ARGUMENT

1. The assignment of error by appellant can best be answered by quoting excerpts from the opinion filed in the District Court by the Honorable Roger T. Foley in the denial of appellant's motion:

“The questions raised by the defendant's motion were matters of law except the allegations that perjury was involved in the proceedings as follows:

“1. Perjury was knowingly used by the United States Attorney to secure the conviction;

“2. That the Probation Officer committed perjury in narrating the circumstances surrounding the killing of deceased; and

“3. Alleged perjury by the arresting officer concerning details of defendant's arrest.

“The jury passed upon the credibility of witnesses in arriving at their verdict and the Trial Judge is satisfied from his determination of the credibility of the witnesses that the charges of perjury are unfounded. Therefore, as to the alleged factual matters, the Court is of the opinion that the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief by virtue of his charges above referred to.

“In the brief of defendant’s counsel it is urged that the sentence was “imposed in violation of the Constitution of the United States and is otherwise subject to collateral attack.” Defendant complains that the Trial Court, ‘throughout the trial and in its instructions to the jury, suffered the defendant to stand trial and held him to answer upon a charge of murder in the first degree’ under an indictment charging no greater degree of homicide than that of second degree murder. It should be noted that in all of the cases cited in behalf of the defendant the points similar to those raised here were considered on appeals from the judgments rendered and not by way of motion to vacate sentence or habeas corpus. Defendant’s motion comes in the absence of appeal and long after the time for appeal has elapsed.

“The indictment returned April 2, 1954, after the entitlement of the court and cause, is as follows:

‘INDICTMENT FOR VIOLATION
SEC. 1153, T. 18, U.S.C.
SEC. 1111, T. 18, U.S.C.

‘THE GRAND JURY CHARGES:

‘That on or about February 12, 1954, at the Reno Indian Colony, within Indian Country, near the easterly limits of the City of Reno, County of Washoe, State and District of Nevada, and within the jurisdiction of this Court, Philip Carl Ornelas, alias Phillip Carl Molina, defendant above-named, he being then and there an Indian, did, with malice aforethought, but without premeditation, murder one Daisy Morgan, she then and there being another Indian, in violation of Section 1153, Title 18, United States Code. * * ’

“It is to be assumed that the jury considered the evidence in the light of all the instructions given by the Court. From the instructions taken as a whole, the jury were informed that they could not possibly find the defendant guilty of murder of the first degree unless they

found from the evidence that the killing was done in the perpetration or attempt to perpetrate one or more of the felonies named in Sec. 1111 of Title 18, U.S.C.A. This is borne out by the following: Included in Instruction No. 3 defining murder, the Court stated:

‘Murder in the second degree is the unlawful killing of a human being with malice aforethought but without premeditation and deliberation, and which was not committed in the perpetration of or attempt to perpetrate any arson, rape, burglary or robbery.’

“As the indictment expressly negated the element of premeditation, the jury, considering the above with all the other instructions and particularly with reference to Instruction No. 4 informing the jury that every murder committed in the perpetration or attempt to perpetrate any rape is murder of the first degree, were given to understand that if they did not find beyond a reasonable doubt that the death of the victim was the result of a rape or attempt to perpetrate a rape upon her, they could not find the defendant guilty of murder of the first degree.

“The loathsome details of the crime as revealed by the evidence in this case would have supported a finding by the jury that the unfortunate victim came to her death by reason of a beating administered by the defendant in the perpetration or attempt to perpetrate a rape upon her. Upon no other basis under the language of the indictment expressly negating premeditation, and under the instructions of the Court and the evidence in the case, could the jury have returned a verdict of murder in the first degree. It would serve no good purpose to narrate here the sordid details disclosed by the evidence. Sufficient to show the character of the same would be the statement of the Court made at the time of imposition of sentence:

‘There isn’t much that I should say. I don’t want to add to your sorrow or distress by any words that might seem to be a scolding or a lecture or anything of that kind, but you might carry away with you a thought that you are very fortunate, very fortunate that you are not standing here convicted of first degree murder. The evidence in this case, in my opinion, without any reasonable doubt, shows that you are guilty of murder of the first degree, you committed murder of the first degree. You committed murder in the first degree in attempt to perpetrate or in the perpetration of a rape. You committed murder of the first degree in a premeditated brutal killing of an old, innocent Indian woman, 73 or 74 years of age. You committed this crime without any sufficient provocation whatsoever. * * *

“In the case of *State v. Munios*, 44 Nev. 353, 195 Pac. 806, the Supreme Court of Nevada, speaking through Justice Ducker, affirmed a conviction of murder in the first degree. The statutory provisions of the State of Nevada in relation to homicide from the earliest times and at the present day, with the exception to be here noted, were very similar to, if not identical with, the provisions of 18 U.S.C.A. Sec. 1111. Through some oversight, the anomaly referred to by Justice Ducker came into being in 1915 and expired in 1919, when the legislature restored to the statute the provision: ‘That every wilful, deliberate, and premeditated killing shall be deemed murder of the first degree.’ It will be noted this is substantially stated in the federal statute. The provision of the Nevada statute of 1915, insofar as we are concerned here, was:

‘All murder which shall be perpetrated by means of poison, lying in wait,or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, * * * shall be deemed murder of the first degree; and all other

kinds of murder shall be deemed murder of the second degree.'

"The legislature of 1919 filled the blank appearing above by inserting words to the effect that 'every wilful, deliberate and premeditated killing * * ' Speaking of what he called an anomaly, Justice Ducker said: (Page 356 of 44 Nev.)

'This strange, unnatural legislative creature came into being in 1915 and expired in 1919, "unwept, un-honored and unsung" except by the few, who, through the medium of its dispensing power, went unwhipped of public justice. We seriously question the power thus exercised, withdrawing in a large measure that security of life, guaranteed to the people of this state by the organic law of the land. The legislature of 1919 restored to the statute the provision that every wilful, deliberate, and premeditated killing shall be deemed murder in the first degree, and we must believe that the omission was either inadvertant, or its effect not fully appreciated.

" 'Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.'" See section 119 of "An act concerning crimes and punishment". (Rev. Laws, 6384 (now Sec. 1066 N.C.L. 1929)).'

"Here it should be emphasized that the definition of murder contained in the Nevada statute is identical with that of 18 U.S.C.A. Sec. 1111. Now, continuing to quote from *State v. Munios* (Page 357)

'By section 201 of the Criminal Practice Act (Rev. Laws, 7051 (now Sec. 10849 N.C.L. 1929)) the following form is provided:

' "The State of Nevada, plaintiff(against....., defendant. * * * Above named is accused by the Grand

jury * * * of a felony (or the crime of murder * * *), committed as follows: The said....., on the..... day of....., A.D. 19....., or thereabouts, at the county of....., State of Nevada, without authority of law and with malice aforethought, killed....., by shooting with a pistol. * * *”

‘It is well settled that an indictment charging murder in the form prescribed will support a verdict of murder of the first degree. *State v. Millain*, 3 Nev. 409; *State v. Thompson*, 12 Nev. 140; *State v. Hing*, 16 Nev. 307; *State v. Wong Fun*, 22 Nev. 336, 40 Pac. 95.

‘The indictment in the instant case, therefore, would have been sufficient to support a verdict of murder of the first degree before the amendment in 1915 * * * dividing murder into two degrees, by which the provision “any other kind of wilful, deliberate and premeditated killing” was omitted from the statute. If it would have been sufficient then, it certainly was not insufficient at the time the appellant is charged to have committed the crime for which he stands convicted, for the amendment did not alter or affect the statutory definition of murder. It simply limited the cases of first-degree murder, to those special instances designated in the statute.

‘The general definition of murder in the statute includes both degrees, the same as at common law it included all cases of felonious homicide, not only where the murder was perpetrated by means of poison, or lying in wait, or torture, or by any other kind of wilful, deliberate, and premeditated killing, etc., but also those cases where the killing was not characterized by any particular atrocity, or by deliberation or premeditation. *State v. Thompson*, 12 Nev. 140.

‘But it is urged that the provision which makes all other kinds of murder, except those designated murder of the second degree, does away with the common law

and leaves murder of the first degree an offense particularly described by the statute, and embodies certain characteristic elements which must be pleaded in the indictment.'

"On the same page, Justice Ducker went on to say:

'In *Ex Parte Dela*, 25 Nev. 353, 60 Pac. 220, 83 Am.St.Rep. 603, this court said:

' "It was not necessary at Common law to even charge that murder was committed in the perpetration of another crime, and it was sufficient to charge it in the common form; and, upon proof that the crime was committed in the perpetration of another crime, such proof stood in lieu of the proof of malice aforethought.' "

'The use of poison in the commission of the crime of murder, or by lying in wait, etc., its commission in the perpetration or attempting to perpetrate any of the felonies enumerated in the statute, are merely circumstances of aggravation, which, in the law, amount to, or are the equivalent of, premeditation.

'In alleging other forms of murder it was never necessary in this jurisdiction to charge deliberation or premeditation. Upon principle, then, why was it necessary, under the amendment in 1915, to allege the equivalent in order to charge murder of the first degree? We hold that it was not, and that the indictment is sufficient to support the verdict.

'The decisions cited by counsel for appellant to sustain his contention and holding in effect that an indictment charging homicide without charging a premeditated design, or lying in wait, torture, etc., will not support a conviction of murder of the first degree, are opposed to the great weight of authority, and contrary to the principle enunciated in *State v. Thompson*, supra.'

‘Where the homicide is committed in the perpetration of or attempt to perpetrate a felony, or in the withdrawal or escape therefrom, although there is authority which holds it necessary to set out in the indictment or information the felony in the pursuance of which the homicide was committed as well as the homicide, it is usually held that an indictment in the ordinary form for murder or for murder in the first degree is sufficient without averment of the connected felony. Hence allegations as to the connected offense may be disregarded, where the remaining averments are sufficient to charge murder or murder in the first degree in the usual form, and in any event are to be deemed sufficient if accused is not misled or prejudiced.’

—40 C.J.S. 1038, Sec. 148, Homicide.

“In *State v. Wong Fun*, 22 Nev. 336, 340, the charging part of the indictment was as follows:

‘The said George Fong, on the 4th day of October, A.D. 1894, or thereabouts, without authority of law, and with malice aforethought killed one Hing Lee, a human being, by shooting him.’

“The Supreme Court of Nevada went on to say:

‘Under our statute dividing murder into two degrees, and the one providing a form of indictment, this indictment is sufficient to support a verdict of murder in the first degree, although it does not charge that the killing was done with premeditation and deliberation. Citing Nevada cases.

‘Premeditation or malice aforethought is an essential ingredient of the offense of murder. “Malice aforethought” or “malice prepense,” which are the terms usually applied to the malice requisite in murder, is malice existing before the killing and acting as a cause of the killing. The term “malice afore-

thought'' imports premeditation, and has been held to involve deliberation, * * *.'

—40 C.J. S. 861, Sec. 15, Homicide.

'Premeditation or malice aforethought is a necessary ingredient of murder.'

—*People v. Erno* (Cal.), 232 Pac. 710,
Syll. 7 and 9.

"As we have seen, the indictment here alleged that the killing was done with malice aforethought but without premeditation. From the quotations above we see that the terms 'premeditation' and 'malice aforethought,' by the usual definitions, are synonymous.

"The defendant's contention that the indictment here does not include a charge of first degree murder is based entirely upon the clause 'but without premeditation.' Counsel's theory may be derived from their reading of the forms of indictment for first degree murder to be found in the appendix of forms following the Federal Rules of Criminal Procedure, which forms, it may be noted, are merely illustrative and not mandatory. Rule 58, Fed. Rules Crim. Proc., 18 U.S.C.A. If, in the use of either of those forms the words 'with premeditation' did not appear in the indictment but were replaced with the words 'without premeditation,' there would be no allegation in such an indictment of the essential element of murder of the first degree, there would be no allegation of the unlawful killing of a human being with malice aforethought. Here there is, it being averred in the indictment that 'defendant * * * did, with malice aforethought * * *.' The words 'malice aforethought' import premeditation.

"If any meaning is to be given to the action of the pleader here with using in the indictment the terms 'with malice aforethought' and following the same with the clause 'but without premeditation,' it can only be considered as an attempt upon the part of the pleader to

eliminate from the case but one of the categories of first degree murder defined by Sec. 1111, 18 U.S.C.A., viz: "or any other kind of wilful, deliberate, malicious, and premeditated killing; * * *." Under an indictment as here, any revelant evidence that the murder was committed in the perpetration or attempt to perpetrate any of the named felonies could be received.

"The United States Court of Appeals, District of Columbia, in *Burton v. United States*, 151 F.2d 17, makes it plain, when considered with other cases cited in this Opinion, that under an indictment in the common law form for murder in the first degree, the prosecution may prove facts to bring the case within any of the provisions of the statute defining murder in the first degree. In the opinion it was there stated:

'Appellant was convicted of murder in the second degree. The indictment charged murder in the first degree—a killing with deliberate and premeditated malice.

'(1,2) The first ground of appeal is an instruction given that the jury might return a verdict of murder in the first degree if they believed that the killing was committed while appellant was engaged in robbery. The court then defined the crime of robbery. It is argued that this instruction was improper because robbery was not charged in the indictment. There is no merit to this contention. The perpetration of a robbery, during which act a homicide is committed, legally takes the place of that premeditation to kill which is necessary for murder in the first degree. And, "under an indictment in the common law form the prosecution may prove facts to bring the case within any of the provisions of the statute defining murder in the first degree." It was held in *State v. McGinnis* (59 S.W. 83, No.) that it is proper, under an indictment which simply charges murder, to instruct the jury that, if the homicide was committed in an at-

tempt to commit robbery, the defendant was guilty of murder in the first degree. And it is not error to give such instruction because the indictment tendered no such issue as robbery.'

"In the conduct of the trial the court did not enlarge nor attempt to enlarge the scope of the indictment."

2. Assuming, *arguendo*, that the indictment charges second degree murder, the appellant is not entitled to any relief by reason of his motion.

It has been held that a motion to vacate under Title 28, Section 2255, U. S. C. is not available, in lieu of appeal, to correct trial errors even though constitutional questions are involved.

In the case of *United States v. Walker*, 197 F.2d 287 (CA 2d, 1952), (Certiorari denied, 344 U.S. 877), defendant's motion under 28 U.S.C.A., S. 2255, for vacation of judgment and discharge from imprisonment, was grounded on the premise that his conviction resulted from evidence procured from him while he was held in illegal custody under a warrant of arrest which he originally assumed to be valid but now claims to have been void by reason of facts which were later discovered.

The circuit court in affirming the district court's denial of the motion said (at page 288):

"Assuming that the evidence could have been suppressed by proper motions before or during the trial, it is extremely doubtful that objection to the evidence can be raised at this late date by motion under 28 U.S.C.A., S. 2255. Such a motion cannot ordinarily be used in lieu of appeal to correct errors committed in the course of a trial, even though such errors relate

to constitutional rights. (Citing *Howell v. U.S.*, 4th Cir., 172 F.2d, 213, certiorari denied 337 U. S. 906: 'It is elementary that neither habeas corpus nor motion in the nature of application for a writ of error coram nobis can be availed of in lieu of writ of error or appeal, to correct errors committed in the course of trial, even though such errors relate to constitutional rights. It is only where there has been the denial of the substance of a fair trial that the validity of the proceedings may be thus collaterally attacked or questioned by motion in the nature of petition for writ of error coram nobis or under 28 U.S.C.A., S. 2255.')

In the case of *United States v. Jonikas*, 197 F.2d 675 (CA 7th, 1952), Certiorari denied 344 U. S. 877, the court reviews this proposition and states at page 676:

"The purpose of the proceeding provided for by 28 U.S.C.A. par. 2255 is to give the prisoner a method for a direct attack on his sentence in the court in which he was tried and sentenced; but to attack the sentence successfully in such a proceeding the prisoner must have grounds which would support a collateral attack on the sentence. Mere errors of law occurring in the trial which could be corrected by an appeal, cannot serve as grounds for an attack on the sentence under par. 2255.

"In *Pullian v. United States*, 10 Cir., 178 F.2d 777, a prisoner tried to vacate his sentence on the ground that the indictment had been deficient. There the court said, 178 F.2d at page 778:

'Section 2255, supra, does not give a prisoner the right to obtain a review, first by the court which imposed the sentence and then on appeal from a denial of a motion to vacate, of errors of fact or law that must be raised by timely appeal. * * * While the nature of the attack is direct, the grounds therefor are limited to matters that may be raised by collateral attack. It is only where the judgment was

rendered without jurisdiction, the sentence imposed was not authorized by law, or there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack that a motion to vacate will lie under such section.'

"In *Taylor v. United States*, 4 Cir., 177 F.2d 194, 195, the court said:

'Prisoners adjudged guilty of crime should understand that 28 U.S.C.A., par. 2255 does not give them the right to try over again the cases in which they have been adjudged guilty. Questions as to the sufficiency of the evidence or involving errors either of law or of fact must be raised by timely appeal from the sentence if the petitioner desires to raise them. Only where the sentence is void or otherwise subject to collateral attack may the attack be made by motion under 28 U.S.C.A., S. 2255, which was enacted to take the place of habeas corpus in such cases and was intended to confer no broader right of attack than might have been made in its absence by habeas corpus.'

"In *Hastings v. United States*, 9 Cir., 184 F.2d 939, the court denied such a motion which alleged insufficiency of evidence and the giving of an erroneous instruction. The court there affirmed the decision of the trial court denying the motion, saying, 184 F.2d at page 940:

'There was no appeal from the judgment of conviction and what appellants seek in this Sec. 2255 proceeding is a retrial of their case.' "

The case of *United States v. Haywood*, 208 F.2d 156 (CA 7th, 1953) again restates the general rule as follows, page 158):

"Of course it is not a technicality, but a well established rule of law, that mere errors of law occurring at the trial, which could be corrected upon an appeal,

cannot serve as the basis of attacking the judgment of conviction under Sec. 2255. *United States v. Jonikas*, 7 Cir., 197 F.2d 675, 676. A motion under Sec. 2255 cannot ordinarily be used in lieu of an appeal to correct errors committed in the course of a trial even though such errors relate to constitutional rights. *United States v. Walker*, 2 Cir., 197 F.2d 287, 288; *United States v. Rosenberg*, 2 Cir., 200 F.2d 666, 668 . . .”

In the decision of *Smith v. United States*, 187 F.2d 192 (CA. D. C. - 1950), the court, at page 197, states:

“We referred with apparent approval in *Meyers v. United States*, Supra, (86 U.S. App. D. C. 320, 181 F.2d 803), to the statement therein attributed to Judge Holtzoff, D. C., 84 F. Supp. 766, that errors committed during a trial may not be reviewed by habeas corpus unless involving jurisdiction of the court or ‘deprivation of constitutional rights amounting to a denial of the essence of a fair trial, . . .’ This we think is a fair statement of the principle to be applied as we read the lesson of the decisions of the Supreme Court.”

And at page 198:

“* * * Appellant had full opportunity to attack on his trial the evidence now challenged and to appeal on the basis of its erroneous admission if he so desired.”

The Fifth Circuit, in the case of *Bowen v. United States* 192 F.2d 515 (CA 5th - 1951), has ruled as follows (at page 517):

“After all, while it is of the essence of the constitutional principles which mark and distinguish our system: that trials be conducted according to law; that in short, the government be obliged to control itself; and that when one had been convicted in violation of those principles he should be accorded relief; it is also

of the essence: that the government be enabled to control the governed and to that end that judgments have finality; and that trials, conducted in accordance with law and ending in conviction, some day be at an end. Especially is it of the essence of orderly trials that the right to counsel accorded to defendants by the constitution be not regarded, as the argument here would seem to regard it, as a mere one way street such that, if the strategy and tactics of his trial counsel, in determining not to raise constitutional questions, prove unsuccessful, defendant, without appealing from the judgment, may many years later set it aside in order that, on another trial with another counsel, another course raising these questions may be taken, and so on ad infinitum."

3. The authority cited by appellant in support of his motion stemmed from direct appeals taken after conviction, and none involved collateral motions to vacate judgment.

Neither a habeas corpus action, or a motion to vacate a judgment is a substitute for a direct appeal. The annotations under 28 U.S.C., Sec. 2255 abound with supporting citations of this proposition.

4. A motion to vacate the judgment is ineffective unless it can be shown that if granted, and followed by retrial, the result would be different from that presently obtaining.

The case of *United States v. Moore*, 166 F.2d 102 (CA 9 - 1948) holds as follows (at page 104):

"We take it that there can be no question but that when it is sought to set aside or vacate a judgment whether by complaint in equity or by way of coram nobis or its modern equivalent, a motion to vacate, such as we have before us, no relief can be granted

unless it appears that a retrial will result in a judgment different from the one sought to be vacated and that, in the absence of such a showing, the judgment will not be set aside. The reason for this rule is that if defendant has no valid defense, so that a second trial must result in an identical judgment, then no actual injury has occurred and it would be a vain and idle thing to set aside the judgment already entered. As a corollary, it is not sufficient to aver merely, in general terms, that defendant has a good and meritorious defense but the nature of that defense, the facts constituting it, must be set forth in such detail as to enable the court to determine whether it is meritorious and sufficient." (Citing cases).

* * * * *

"Inasmuch as petitioner makes no averment that he is innocent, or that he has any defense of any character to the charge to which he has previously pleaded guilty, he has not made out a case for relief. He does not claim that if he had been permitted to interpose a defense, with proper representation of counsel, the judgment could have been any other than what it was. He denies in no way the charge upon which he was convicted and makes no suggestions of any defense in whole or in part."

In *United States v. Bremer*, 207 F.2d 247 (CA 9th, 1953), the court cites with approval the correctness of the principle stated in *United States v. Moore*, supra.

Appellant's motion puts forth no claim of defendant's innocence, nor is there any contention that a retrial would bring a different degree of conviction or result in a different punishment. Appellant was convicted of second degree murder and received the maximum punishment authorized for that offense. He does not now contend that upon retrial he might be convicted of a lesser offense.

CONCLUSION

It is contended that the appellant was fairly and justly convicted of the offense charged in the indictment, and that the order denying appellant's motion be affirmed.

Respectfully submitted,

FRANKLIN RITTENHOUSE,
United States Attorney

HOWARD W. BABCOCK,
Assistant United States Attorney

Dated: May 3, 1956.

No. 15037

**United States
Court of Appeals**
for the Ninth Circuit

LEONARD CRUZ-SANCHEZ,

Appellant,

vs.

ROBERT ROBINSON, Officer in Charge, Immigration and Naturalization Service, Los Angeles, California, and MERRIL O'TOOLE, Regional Commissioner, San Pedro, California,

Appellees.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**

FILED

JUL -6 1956

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Action for Declaratory Judgment and Judicial	
Review	66
Appeal:	
Notice of	72
Statement of Points on	75
Certificate of Clerk	73
Findings of Fact and Conclusions of Law	58
Judgment	63
Motion and Notice of Motion to Dismiss	69
Names and Addresses of Attorneys	1
Notice of Appeal	72
Order of Dismissal	71
Order to Show Cause	5
Petition for a Writ of Habeas Corpus	3
Return Order to Show Cause and Answer to	
Petition for Writ of Habeas Corpus	6
Ex. A—Certified Record of the Immigra-	
tion and Naturalization Service,	
Dept. of Justice, Relating to the	
Petitioner	9
Ex. B—Affidavit of Detaining Officer	57
Statement of Points on Appeal	75

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United States District Court, Southern District
of California, Central Division

Civil No. 18554-WM

LEONARD CRUZ-SANCHEZ,

Petitioner,

vs.

ALBERT DEL GUERCIO, Officer in Charge, Im-
migration & Naturalization Service, Los An-
geles, California; MERRIL O'TOOLE, Re-
gional Commissioner, San Pedro, California,

Respondents.

PETITION FOR WRIT OF
HABEAS CORPUS

To the Honorable United States District Court for
the Southern District of California, Central
Division:

The petition of Leonard Cruz-Sanchez respect-
fully shows:

1. Petitioner makes application herein for a writ of habeas corpus in that he is unlawfully detained and restrained of his liberty by the said Albert Del Guercio, respondent, and is now in the custody of the said Albert Del Guercio, as Officer in Charge of the Immigration and Naturalization Service, Los Angeles, California, at 458 South Spring Street, Los Angeles, California.

2. The cause or pretext of such detention and restraint is an order of Deportation issued by or

through the respondent herein, the said Albert Del Guercio, under which your petitioner fears that he will be deported from the United States without due process of law. [2*]

3. Said detention and restraint is unlawful in that the said Order of Deportation was issued without a fair hearing in accordance with the Constitution of the United States.

4. Your petitioner herein is informed and believes and therefore alleges that all administrative procedures and remedies have been exhausted and that unless this Honorable Court take jurisdiction of this case, he will be deprived of the right to have this case reviewed by this Honorable Court.

5. No other application for this writ has heretofore been made to any other Court or judge.

6. That there has not been time for an examination of the record in this case because your petitioner herein did not receive notice of his impending deportation until August 10, 1955; that within this time, your petitioner has been unable to secure or retain Counsel for the purposes of examining the record or file in this case; that your petitioner was able to retain Counsel on August 11, 1955, and did retain Richard R. Cody, Attorney at Law, to represent him in this matter; that said attorney has not had time to examine the record or file in this case.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Wherefore, petitioner prays that a writ of habeas corpus issue herein directed to the said Albert Del Guercio, commanding him to produce the body of the petitioner, Leonard Cruz-Sanchez, before this Court at a time and place to be specified in said writ, to the end that this Court may inquire into the cause of the petitioner's detention, and that the petitioner be ordered discharged from the detention and restraint aforesaid.

/s/ LEONARD CRUZ-SANCHEZ,

By /s/ RICHARD R. CODY,

His Attorney.

Duly verified.

[Endorsed]: Filed August 15, 1955. [3]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the verified petition, and exhibits attached, of Leonard Cruz-Sanchez for issuance of a writ of habeas corpus, it is

Ordered, that the respondent, Albert Del Guercio, show cause before this Court, at Los Angeles, California, on September 6, 1955, at 11 o'clock a.m., why a writ of habeas corpus should not issue herein as prayed for in said petition; and it is further

Ordered, that the petitioner be retained within this district until further order of this Court; and it is further

Ordered, that service of this order to show cause together with a copy of the verified petition, and exhibits attached, on respondents, Albert Del Guer-
cio, on or before August 17, 1955, at 5 o'clock p.m.,
be deemed sufficient service.

Dated: August 15, 1955.

/s/ W. M. BYRNE,

United States District Judge.

[Endorsed]: Filed August 15, 1955. [5]

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE AND
ANSWER TO PETITION FOR WRIT OF
HABEAS CORPUS

Comes now the respondents above named, by and
through their attorneys, Laughlin E. Waters,
United States Attorney; Max F. Deutz, and Edwin
H. Armstrong, Assistant United States Attorneys,
and making their answer to the Petition for Writ
of Habeas Corpus, and for their return to the Order
to Show Cause issued on the 15th day of August,
1955, by the Honorable William M. Byrne, Dis-
trict Judge, admit, deny and allege as follows:

I.

In answer to paragraph 1 of petition, respondents
admit that petitioner is being detained by Robert

H. Robinson, Acting Officer in Charge, Immigration and Naturalization Service, Los Angeles, California, but except as specifically admitted, deny each and every allegation therein contained in said paragraph. [6]

II.

In answer to paragraph 2 of petition, respondents admit that the detention and restraint is an order of deportation and, except as expressly admitted, deny each and every allegation contained in said paragraph.

III.

In answer to paragraph 3 of petition, respondents deny generally and specifically each and every allegation therein contained.

IV.

In answer to paragraph 4 of petition, respondents admit each and every allegation therein contained.

V.

In answer to paragraph 5, respondents have no information upon which to base a belief as to the truth of the allegations there contained and upon that ground deny generally and specifically each and every allegation therein contained.

VI.

In answer to paragraph 6 of petition, respondents allege that they have no information upon which to base a belief as to the truth of the matter

therein stated, and upon said ground deny generally and specifically each and every allegation therein contained.

For a Further, Separate and Affirmative Defense to Said Petition, Respondents Allege:

I.

That petitioner has been accorded a full and fair hearing in conformity with law to determine his rights to be and remain in the United States. There is attached hereto, as part of this return, marked Exhibit A, a certified record of the Immigration and Naturalization Service, Department of Justice, relating to [7] the petitioner, containing a complete record of the deportation proceedings before the Immigration and Naturalization Service and the orders of the Special Inquiry Officer and the Board of Immigration Appeals.

II.

There is attached hereto an Affidavit of Robert H. Robinson, Acting Officer in Charge, Immigration and Naturalization Service, Los Angeles, California, marked Exhibit B, which affidavit shows that the person now detaining the petitioner herein is the said Robert H. Robinson and is no longer Albert Del Guercio.

Wherefore, respondents pray that petition for writ of habeas corpus filed herein be denied, and that the order to show cause as heretofore issued

be discharged, and for such other and further relief as the Court deems just and proper in the premises.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

EDWIN H. ARMSTRONG,
Assistant U. S. Attorney;

/s/ EDWIN H. ARMSTRONG,
Attorneys for Respondents.

EXHIBIT A

United States of America
Department of Justice
Immigration and Naturalization Service
Los Angeles, California

August 17, 1955.

CERTIFICATION

By virtue of the authority vested in me by Title 8, Code of Federal Regulations, Section 2.1, a regulation issued by the Attorney General pursuant to Section 103 of the Immigration and Nationality Act,

I hereby certify that the annexed documents are originals, or copies thereof, from the records of the

Exhibit A—(Continued)

said Immigration and Naturalization Service, Department of Justice, relating to Leonard Cruz-Sanchez, aka Leonard M. Cruz, File No. T-1497289, of which the Attorney General is the legal custodian by virtue of Section 103 of the Immigration and Nationality Act.

In Witness Whereof I have hereunto set my hand and caused the seal of the Department of Justice, Immigration and Naturalization Service, to be affixed, on the day and year first above written.

[Seal] /s/ ROBERT H. ROBINSON,
Acting Officer in Charge, Immigration and Naturalization Service, Los Angeles, California. [9]

T-1497289 DDP G

August 17, 1955.

Chairman, Board of Immigration Appeals,
Washington, D. C.,

Acting Officer in Charge, Los Angeles 13, Calif.

Leonard Cruz-Sanchez aka Leonard M. Cruz.

Forwarded herewith for your consideration is copy of a motion to reopen the above case submitted by Boyd H. Reynolds. The subject alien is in detention and deportation may be imminent. A stay of deportation has been denied but a petition for a

Exhibit A—(Continued)

writ of habeas corpus has been filed in the U. S. District Court, Southern District of California.

The original administrative record must be retained here in connection with the Court action. We are accordingly forwarding herewith a complete copy of the record including copies of all exhibits. Enc. [10]

Boyd H. Reynolds

Counselor on

Immigration and Naturalization

Member Mississippi and American Bar Association

Suite 214, Douglas Bldg.

257 South Spring Street

Los Angeles 12, California

MAdison 5-2598

August 10, 1955.

In Answering Please Refer to No. 4/224.

Registered Mail—Special Delivery—

Return Receipt Requested

Officer in Charge,

Immigration and Naturalization Service,

Los Angeles, California.

Re: Leonard Cruz-Sanchez aka

Leonard M. Cruz,

Your File T1 497 289 and

1300/128823

Exhibit A—(Continued)

Sir:

Enclosed please find Motion to Reopen, in triplicate, in the case of the above named together with Money Order in the amount of \$25.00.

Sincerely,

/s/ BOYD H. REYNOLDS.

BHR/aa [11]

In Re:

LEONARD CRUZ-SANCHEZ, Also Known as
LEONARD M. CRUZ.

File Number T1 497 289 and
Los Angeles (1300/128823)

MOTION TO REOPEN

Chairman, Board of Immigration Appeals,
Washington, D. C.

Comes now Leonard Cruz-Sanchez, also known as Leonard M. Cruz, through his Attorney Boyd H. Reynolds, and moves that his hearing under deportation proceedings be reopened for the purpose of showing the following:

1. That he is not subject to deportation under Sections 13 and 14 of the Immigration Act of 1924 in that he was not in possession of a valid immigration visa at the time of his last entry in Calexico, California, about March, 1950;

Exhibit A—(Continued)

2. That he was not required to present such immigration visa for the reason that he was a legal resident of the United States and was only in Mexico for a few hours at the time of his last entry in March, 1950;

3. To show that he had been a legal resident of the United States since his entry at El Paso, Texas, on January 11, 1933;

4. To show that he comes within Section 405 of Public Law 414 the Savings Clause in that deportation proceedings were instituted prior to the effective date of Public Law 414.

5. To apply for the discretionary relief in advance vested in the Attorney General for the exercise of the Seventh Proviso of the Immigration Act of 1917;

6. To show that he has been a continuous resident of the United States since January 11, 1933, and also that his mother is a permanent resident of the United States and that he has thirteen brothers and sisters who are native-born citizens of the United States;

7. To show that the hearings granted him under deportation proceedings in 1952 and 1953 were unfair in that no attempt was made to verify his lawful entry.

Evidence: Photostatic copy of document showing legal entry into the United States on January 11, 1933.

Exhibit A—(Continued)

Wherefore, it is respectfully requested that the hearing be reopened for the purposes above stated.

/s/ BOYD H. REYNOLDS,
Counselor.

Subscribed and sworn to before me at Los Angeles, California, this 10th day of August, 1955.

[Seal] /s/ ALICE R. APODACA,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires March 27, 1957. [12]

At Paso, Tex.

Petronilo Cruz 46 m m
Scar Left cheek 5'3"
Emila Martinez de Cruz 5'2" mole over left eyebrow
Leonardo Cruz Infant
m 1 month

The above admitted by
the Department Exch.
Returning Re...

4997

Ass. by 12

Santos Orta 18 m
Agustina Cruz 16 f
Lilia Orta 16 f
Eva Cruz 13 f
Maria Luisa Orta 13 f
Norberto Orta 11 m
Adam Cruz 11 m
Maria Beatriz Cruz 9 f
Esperanza Cruz 8 f
Virginia Cruz 6 f
Elena Cruz 4 f
El Encarnacion 2 m

(12)
all born
in various
places in
Arizona
B.B. 28316
G.C.
Indus

Exhibit A—(Continued)

United States of America
Department of Justice
Los Angeles, California

WARRANT—DEPORTATION OF ALIEN

No. T1 497 289

To: District Enforcement Officer,
Los Angeles, California.

Or to any Officer or Employee of the United States Immigration and Naturalization Service.

Whereas, after due hearing before an authorized immigrant inspector, and upon the basis thereof, an order has been duly made that the alien, Leonard Cruz-Sanchez, who entered the United States at Calexico, California, on or about March, 1950, is subject to deportation under the following provisions of the laws of the United States, to wit:

The Immigration Act of May 26, 1924, in that, at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulation made thereunder.

The Act of February 5, 1917, in that on or after May 1, 1917, he has been sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime

Exhibit A—(Continued)

involving moral turpitude committed within five years after entry, to wit: Burglary, 2nd degree and Grand Theft.

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, do hereby command you to take into custody and deport the said alien pursuant to law, at the expenses of the

Appropriation, "Salaries and Expenses Immigration and Naturalization Service, 1954," including the expenses of an attendant if necessary.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 13th day of August, 1953.

/s/ H. R. LANDON,
District Director. [14]

U. S. Department of Justice
Board of Immigration Appeals

July 16, 1953.

DECISION

File: T1 497 289—Los Angeles (1300-128823).

In re: Leonard Cruz-Sanchez aka Leonard M. Cruz,
in Deportation Proceedings.

Exhibit A—(Continued)

In Behalf of Respondent: Mrs. Hope Borys (sister), 416 Del Norte Street, Los Angeles, California.

Charges:

Warrant:

Act of 1924—No immigration visa.

Act of 1917—Convicted of crime and sentenced to imprisonment for one year within five years after entry—Burglary, 2nd degree and grand theft.

Lodged: None.

Application: Termination of proceedings.

This case is before us on appeal from an order entered by the Hearing Officer on March 5, 1953, directing that the alien be deported from the United States on the charges contained in the warrant of arrest.

The respondent, a 20-year-old single male, a native and citizen of Mexico, last entered the United States at the port of Calexico, California, about March, 1950, after a short visit to Mexico. He was not in possession of an immigration visa. He testified that when he was a few months old, he was lawfully admitted to the United States for permanent residence in 1933 and has resided continuously in this country since. On May 9, 1952, the re-

Exhibit A—(Continued)

spondent was convicted in the Superior Court of the State of California, in and for the County of Madera, upon his plea of guilty, of the crimes of Burglary in the Second Degree and Grand Theft committed on or about March 21, 1952. He was sentenced by the Court to imprisonment in the State Prison for the term prescribed by law for the aforesaid crimes, the sentences to be served consecutively. He is presently serving these sentences. The record shows that the length of the sentences is one to fifteen years and one to ten years. It is concluded from the evidence of record that the respondent is subject to deportation on the charges contained in the warrant of arrest.

The record reflects that the respondent was also convicted in Madera, California, in 1951, for Malicious Mischief and was sentenced to 30 days in the County Jail. [15]

Since the respondent is subject to deportation on a ground specified in Section 19(d) of the Immigration Act of 1917, he is not eligible for suspension of deportation.

Respondent's mother, Mrs. Emilia M. Cruz, and his sister, Mrs. Hope Borys, have written to us appealing in the respondent's behalf. We sympathize with their concern regarding respondent's immigration status. However, under applicable law we have no authority to correct his situation. Accordingly, we must dismiss the appeal.

Exhibit A—(Continued)

Order: It is ordered that the appeal be and the same is hereby dismissed.

/s/ THOS. S. FINNUCANE,
Chairman. [16]

United States Department of Justice
Immigration and Naturalization Service
(1-15-53)

In the Matter of:

LEONARDO CRUZ-SANCHEZ

File No. T1 497 289-IB.

Date: March 23, 1953.

Notice of Appeal to the Board of Immigration
Appeals, Department of Justice, Washington,
D. C.

I hereby appeal from the decision in the above-entitled case dated March 11, 1953, and received by me on March 23, 1953.

[If an appeal is taken in a deportation proceeding, it is not perfected unless the form on the reverse of this notice is executed.]

I am filing herewith (or will file within the time set by the appropriate local immigration officer) written brief or other statement for

Exhibit A—(Continued)

consideration by the Board of Immigration Appeals.

I do desire oral argument before the Board of Immigration Appeals in Washington, D. C.

Oral argument in any one case should not extend beyond fifteen (15) minutes, unless arrangements are made in advance of the hearing for additional time.

LEONARD CRUZ,

(Signature of Appellant or
Representative.)

Box 128,

Chino, California.

(Address.)

I desire my sister, Mrs. Hope Borys, 416 Del Norte St., Los Angeles 65, Calif., to appear for me at time of oral argument.

/s/ LEONARD CRUZ.

Note: If the appellant is in detention or has been denied admission to the United States at the Canadian or Mexican border, he will not be released from detention nor permitted to enter the country to present oral argument to the Board. In such cases, if representation is desired, the appellant should arrange for someone to present his case to the Board of Immigration Appeals. Unless such arrangement is made at the time the appeal is taken, where representation is desired, the Board of Im-

Exhibit A—(Continued)

migration Appeals will not calendar the case for argument.

Record to BIA 3/31/53, file. [17]

[Reverse]

To Be Executed in All Appeals in
Deportation Proceedings

* * *

State briefly the reasons for this appeal:

1. At the time that I committed the crime for which I am now serving time in prison, I was only 19 years old, and did not know then what the consequences would be.

2. I have all my family and relatives in the U.S.A., none in Mexico. They are all citizens of the U.S.A.

3. I know nothing about Mexico, except what I've heard or read.

4. I have taken out all of my Naturalization Papers. The reason I am not a Naturalized Citizen is because I was not old enough to take the oath.

5. At the time of my conviction I asked if I could join the service instead of going to prison but I was denied.

/s/ LEONARD CRUZ.

Exhibit A—(Continued)

United States Department of Justice
Immigration and Naturalization Service
458 So. Spring Street
Los Angeles 13, California

March 11, 1953.

Please address reply to
District Director, and refer to this
File No. T1 497 289-IB.

Leonardo Cruz-Sanchez,
c/o California State Prison,
Chino, California.

Dear Sir:

The attached is a copy of the decision and order of Special Inquiry Officer in the case of Leonardo Cruz-Sanchez.

This order is final unless an appeal is taken to the Board of Immigration Appeals in Washington, D. C., and notice of appeal is filed within 10 days (not including Sundays and holidays) after receipt of this notice.

If an appeal is desired, the Notice of Appeal on Form I-290A, copies of which are enclosed, should be executed in duplicate and filed with this office. A brief or other written statement in support of your appeal may be submitted with the Notice of Appeal.

Exhibit A—(Continued)

You may also request oral argument before the Board of Immigration Appeals. However, an alien who is in detention or who has been denied admission at the Canadian or Mexican border will not be released from detention nor permitted to enter the country to present oral argument to the Board. Such an alien desiring representation must arrange to have someone appear on his behalf before the Board. Unless the name and address of the representative is forwarded with the Notice of Appeal, the Board of Immigration Appeals will not calendar the case for argument.

Any question which you may have will be answered by the local immigration office nearest your residence or at the address shown in the heading of this letter.

Sincerely yours,

.....

For the District Director.

Enclosures.

Registered Mail—Return Receipt Requested.

[Post office return receipt for Reg. Article No. 454412, dated March 16, 1956, signed by L. C. Sanchez, attached.] [18]

Exhibit A—(Continued)

United States Department of Justice
Immigration and Naturalization Service

March 5, 1953.

File: T1 497 289—Los Angeles.

In re: Leonard Cruz-Sanchez aka
Leonard M. Cruz.

In Deportation Proceedings

In Behalf of Respondent: No one.

Charges:

Warrant:

Act of 1924—No immigration visa.

Act of 1917—Convicted of crime and sentenced to imprisonment for one year within five years after entry—Burglary, 2nd degree and grand theft.

Lodged: None.

Application: None.

Warrant of Arrest Served: July 21, 1952.

Discussion:

This record relates to a 20-year-old single male, a native and citizen of Mexico who last entered the United States at Calexico, California, about March, 1950. That entry has not been verified. The alien has stated that he entered to resume his residence

Exhibit A—(Continued)

and to work although he was not in possession of an unexpired immigration visa. He has stated that he was lawfully admitted to the United States for permanent residence as a child of a few months of age in 1933. He has resided continuously in the United States since that time except for a brief visit of a few hours to Mexico prior to his last entry. The record does not contain evidence of his lawful entry for permanent residence as alleged. Accordingly, his entry was unlawful and he is subject to deportation under the Immigration Act of 1924 on the charge stated in the warrant of arrest.

The record shows that the alien pleaded guilty in the Superior Court of the State of California, in and for the County of Madera, to the crime of burglary in the second degree, committed about March 21, 1952, and to the crime of grand theft committed about March 21, 1952, and was sentenced by said Court on May 9, 1952, to imprisonment in the State Prison for the term prescribed by law for the aforesaid crimes. He is presently serving that sentence. On the basis of the aforementioned evidence, the alien is additionally subject to deportation under the Immigration Act of 1917 on the charge stated in the warrant of arrest.

The alien is single and has no close relatives residing outside of the United States. His mother, a brother and a sister reside in this country. He has no property or assets in the United States. As he has been found to be subject to [19] deportation on

Exhibit A—(Continued)

a ground specified in Section 19(d) of the Immigration Act of 1917, he is statutorily ineligible for relief from deportation. He has not made an application for relief. He has specified Mexico as the country to which he desires to be deported in the event that such an order is issued.

Findings of Fact as to Deportability:

(1) That the respondent is an alien, a native and citizen of Mexico;

(2) That the respondent last entered the United States at Calexico, California, about March, 1950;

(3) That the respondent entered; to work and to reside;

(4) That the respondent, at the time of his last entry, was not in possession of an unexpired immigration visa;

(5) That the respondent has never been lawfully admitted into the United States for permanent residence;

(6) That the respondent was convicted on his plea of guilty in the Superior Court of the State of California in and for the County of Madera for the crime of burglary, second degree, committed about March 21, 1952, and to the crime of grand theft committed about March 21, 1952, and by said Court on May 9, 1952, was sentenced to imprisonment to the

Exhibit A—(Continued)

State Prison for the term prescribed by law for those offenses.

Conclusions of Law as to Deportability:

(1) That under Sections 13 and 14 of the Immigration Act of 1924, the respondent is subject to deportation on the ground that at the time of entry he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder:

(2) That under Section 19 of the Immigration Act of 1917, the respondent is subject to deportation on the ground that he has been sentenced to imprisonment for a term of one year, or more, on or after May 1, 1917, because of conviction in this country of a crime involving moral turpitude committed within five years after entry, to wit: burglary, second degree, and grand theft.

Order:

It is ordered that the alien be deported from the United States in the manner provided by law on the charges contained in the warrant of arrest. [20]

I Certify that the foregoing is a correct transcript of my oral decision in this case.

/s/ WADE H. WESTMORELAND,
Special Inquiry Officer.

Exhibit A—(Continued)

I Certify the foregoing to be a correct transcript of the decision of the Special Inquiry Officer contained in the record in the above case.

/s/ GERTRUDE E. SAMUELS,
Stenographer. [21]

United States Department of Justice
Immigration and Naturalization Service
458 South Spring Street
Los Angeles 13, California

File No. T-1497289 (IB).

Date: February 18, 1953.

Leonardo Cruz-Sanchez,
California State Prison,
Chino, California.

Dear Sir:

Pursuant to the warrant of arrest served on July 21, 1952, you are advised to appear in the California State Prison, Chino, California, on March 5, 1953, at 9:00 a.m., for a hearing to enable you to show cause why you should not be deported from the United States in conformity with law.

You are charged with being an alien illegally in the United States and subject to deportation upon the following grounds:

The Act of February 5, 1917, in that on or after May 1, 1917, you have been sentenced to

Exhibit A—(Continued)

imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude committed within five years after entry, to wit: Burglary, 2nd degree, and Grand Theft; and

The Immigration Act of May 26, 1924, in that, at the time of entry, you were an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder.

At the hearing you may be represented by an attorney of other person or organization authorized to practice before the Immigration and Naturalization Service. Such representation shall be without expense to the Government. You should bring to the hearing any documents which you desire to have considered in connection with the case. If any document is in a foreign language you should bring the original and certified translation thereof.

Yours truly,

.....,

For the District Director.

Exhibit A—(Continued)

United States Department of Justice
Immigration and Naturalization Service
458 South Spring Street
Los Angeles 13, California

File No. T-1497289 (IB).

Date: December 30, 1952.

Leonardo Cruz-Sanchez,
California State Prison,
Chino, California.

Dear Sir:

Pursuant to the warrant of arrest served on July 21, 1952, you are advised to appear in the California State Prison, Chino, California, on January 26, 1953, at 10:30 a.m., for a hearing to enable you to show cause why you should not be deported from the United States in conformity with law.

You are charged with being an alien illegally in the United States and subject to deportation upon the following grounds:

The Immigration Act of May 26, 1924, in that, at the time of entry, you were an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder; and

The Act of February 5, 1917, in that on or after May 1, 1917, you have been sentenced to

Exhibit A—(Continued)

imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude committed within five years after entry, to wit: Burglary, 2nd degree, and Grand Theft.

At the hearing you may be represented by an attorney or other person or organization authorized to practice before the Immigration and Naturalization Service. Such representation shall be without expense to the Government. You should bring to the hearing any documents which you desire to have considered in connection with the case. If any document is in a foreign language you should bring the original and certified translation thereof.

Yours truly,

.....,

For the District Director.

sgb

Registered Mail. [23]

Exhibit A—(Continued)

United States Department of Justice
Immigration and Naturalization Service
Los Angeles, California

Hearing in
Deportation Proceedings
In the Case of

Leonard Cruz-Sanchez,

File: T1 497 289.

Place: California Institute for Men, Chino, California.

Date: March 5, 1953.

Persons Present: Wade H. Westmoreland, Special Inquiry Officer; Leonard Cruz-Sanchez, Respondent.

Hearing recorded by dictaphone and conducted in the English language.

Special Inquiry Officer to Respondent:

Q. What is your name?

A. Leonard Sanchez Cruz.

Q. Will you stand and be sworn. Do you solemnly swear that your testimony in this proceeding will be the truth, the whole truth and nothing but the truth, so help you God? A. Yes.

Q. I offer for your inspection a warrant No. 1300-128823, issued for the arrest of Leonard Cruz-Sanchez, by the District Director, United States

Exhibit A—(Continued)

Immigration and Naturalization Service, San Francisco, California, dated June 27, 1952, and endorsed to show service on the person named at San Quentin Prison on July 21, 1952. Was this warrant served on you as indicated? A. Yes, sir.

By Special Inquiry Officer:

A copy of this warrant is entered in the record and marked Exhibit 1.

Special Inquiry Officer to Respondent:

Q. This warrant charges that you are in the United States in violation of law because you entered this country at Calexico, California, about March, 1950, at which time you were required to have an immigration visa because you entered to work or to live, but you did not have such a document, and after that entry you have been sentenced to imprisonment for a term of one year or more because of your conviction in this country of a crime of burglary, second degree, and Grand Theft, such crimes involve moral turpitude. Do you understand the nature of these two charges?

A. Yes, I do.

Q. The purpose of these proceedings is to determine your right to be and remain in the United States. Do you understand?

A. Yes, I do. [24]

Q. In these proceedings you have the right to be represented by counsel of your own selection and at

Exhibit A—(Continued)

your own expense, which counsel may be an attorney-at-law or other person qualified to practice before officers of this Service. Do you desire to be represented in this proceedings?

A. Well, I don't have the money to hire a lawyer.

Q. Do I understand then that you do not want to be represented?

A. I would like to represent myself, you know, more or less, speak in my behalf.

Q. Are you ready to proceed with your hearing at this time?

A. Well, I think I have, you know, what I'd like to in full right now.

Q. During these proceedings you will be given an opportunity to examine all of the evidence against you, to present any evidence you may have in your own behalf and to question any witnesses presented by the government, do you understand?

A. Yes, sir.

Q. I now show you a record of a sworn statement made by Leonard Cruz-Sanchez to an immigration officer at San Quentin Prison, California, on June 4, 1952. Will you examine this statement and tell me whether you are the person who made it.

From off the record discussion you state that this is your statement and that it is correct except for the answer on the bottom of the first page where it says that you lived with your brother, Santos Orta,

Exhibit A—(Continued)

on Verdugo Road. That should have been with a sister at that address. Is that correct?

A. Yes.

Q. Otherwise this statement is true and correct?

A. Yes.

By Special Inquiry Officer:

This sworn statement is entered in evidence and marked Exhibit 2.

Special Inquiry Officer to Respondent:

Q. I next show you a summary of criminal record compiled by the Identification Department of the California State Prison, San Quentin, California, No. 668205, relating to Leonard M. Cruz. Will you examine this and state whether this record relates to you? A. Yes, that's mine.

By Special Inquiry Officer:

This report is entered in evidence and marked Exhibit 3. [25]

Special Inquiry Officer to Respondent:

Q. I next show you an Information filed in the Superior Court of the State of California, in and for the County of Madera, on April 17, 1952, wherein the defendant Leonard M. Cruz was accused in Count One of Burglary and in Count Two

Exhibit A—(Continued)

of Grand Theft. Will you examine this and state whether it relates to you? A. Yes.

By Special Inquiry Officer:

This Information is entered in evidence and marked Exhibit 4.

Special Inquiry Officer to Respondent:

Q. I next show you an Abstract of Judgment entered in the Superior Court of the State of California, in and for the County of Madera, filed May 12, 1952, concerning Leonard M. Cruz, Defendant, showing that he pleaded guilty in that Court to the crimes of Burglary, second degree, and Grand Theft and was sentenced to imprisonment in the State Prison for the term prescribed by law on both—for both offenses, said sentences to run consecutively. Does this Judgment relate to you?

A. Yes, sir.

By Special Inquiry Officer:

This certified copy of the judgment is entered in evidence and marked Exhibit 5.

Special Inquiry Officer to Respondent:

Q. Have you ever been lawfully admitted to the United States for permanent residence?

A. Yes.

Q. When and where did that entry occur?

Exhibit A—(Continued)

A. I came over in 1933, when I first came over as a child with my parents.

Q. Where? A. At Juarez.

Q. You came over to El Paso, Texas?

A. Yes, and finally we came to Arizona, I mean I moved to Arizona.

Q. How old were you at that time?

A. Oh, about—the most about four months, I guess.

Q. Are you married? A. No, sir. [26]

Q. Do you have property or assets in the United States? A. No, sir.

Q. Do you have any further statement to make or any evidence to offer to show cause why you should not be deported from the United States?

A. Yes.

Q. Will you proceed.

A. Well, to start with at the time I did my time, I mean, I was only 19 years old and I didn't know more or less what I was getting into, I didn't have the knowledge of what could happen, then second is that, well, if I was to be deported and sent to Mexico, well, I never have been over there except for that time in '51, and, heck, I don't remember now what part of the year it was, but I only was over there for about four hours in Mexicali, and that's all I know about the place. I never have been over there and have relatives as far as I know and—well, if I was to be deported over there, it would be just like another country to me, I mean. I can't speak the language fluently, enough to get along,

Exhibit A—(Continued)

but I mean, as far as, you know, as far as knowing it, I don't know very much about the place. I wouldn't have no place to go if I was deported. Well, I feel that—that I should be given another chance seeing that it's my first offense and I haven't had a bad record, I mean, until this last few years when I stay—now I am getting a little older and then I realize I made a mistake and I would like to, you know—I know I can correct myself in the future if given a chance. I would like to have that chance.

Q. Anything further?

A. Not at the present.

Q. If you are found to be subject to deportation and ordered deported, what country do you wish to specify as the country to which you shall be deported?

A. Well, I might as well go to Mexico, at least I know how to speak their language there.

By Special Inquiry Officer:

At this time I will orally state for the record my decision in your case as follows:

(At this point in the proceeding the Special Inquiry Officer dictated his oral decision which has been transcribed separately.)

Special Inquiry Officer to Respondent:

Q. Have you fully understood my decision in your case?

A. Yes, I have.

Exhibit A—(Continued)

Q. Do you desire to be served with a written copy of that decision? A. Yes, I would. [27]

Special Inquiry Officer to Respondent:

You will be so served and your hearing is now closed.

* * *

I certify that to the best of my knowledge and belief, the foregoing record is a true report of everything that was stated during the course of the hearing, including oaths administered, the warnings given to the alien and the witnesses, and the rulings on objections, except statements made off the record.

/s/ WADE H. WESTMORELAND,
Special Inquiry Officer.

I certify the foregoing to be a true and correct transcript of the recording made of the testimony taken in this case.

/s/ BETTY M. HANSEN,
Stenographer. [28]

Exhibit A—(Continued)

Form I-200

U. S. Department of Justice

Immigration and Naturalization Service

WARRANT FOR ARREST OF ALIEN

United States of America

Department of Justice

San Francisco, California

No. 1300-128823.

To: Chief, Investigations Section, San Francisco, California. Or to any Immigrant Inspector in the service of the United States.

Whereas, from evidence submitted to me, it appears that the alien Leonard Cruz-Sanchez, who entered this country at Calexico, California, by automobile about March, 1950, has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit:

The Immigration Act of May 26, 1924, in that, at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder.

The Act of February 5, 1917, in that on or after May 1, 1917, he has been sentenced to

Exhibit A—(Continued)

imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude committed within five years after entry, to wit: Burglary, second degree, and Grand Theft.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1952."

For so doing, this shall be your sufficient warrant. Witness my hand and seal this 27th day of June, 1952.

/s/ BRUCE G. BARBER,
District Director,
San Francisco District.

Port of San Francisco, Calif.

Date: July 21, 1952.

Warrant for Arrest of

Leonard Cruz-Sanchez,
San Quentin.

Served by me at San Quentin, California, on July 21, 1952, at 9:00 a.m. Alien was then informed as to

Exhibit A—(Continued)

cause of arrest, the conditions of release as provided therein, advised as to right of counsel and furnished with a copy of this warrant.

/s/ E. T. PRATHER,
USINS Investigator.

Prison No. & Name: A-21253, Cruz, Leonard M.
S. F. File No.

California State Prison,
San Quentin, California.
Date: 6/4/52.

Report of investigation of status of Leonard Cruz-Sanchez, conducted by E. T. Prather, USINS Investigator, at San Quentin, California.

Testimony recorded by E. T. Prather, USINS Investigator.

Examination conducted in the English language.
Examining Inspector to:

Q. You are advised that I am a United States Immigrant Inspector and authorized by law to administer oaths in connection with the enforcement of the immigration laws. I desire to take a statement regarding your right to be and to remain in the United States. Any statement which you make should be voluntary and you are hereby warned that such a statement may be used against you. Are you

Exhibit A—(Continued)

willing to make this statement or answer questions under these conditions? A. Yes.

Q. Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

A. Yes.

[Stamped]: No previous record found—6/6/52, Fresno.

Searcher. [29A]

Prison name and number: Cruz, Leonard M.

A-21253.

Date: 6/4/52.

San Quentin, California

My true name is: Leonard Cruz-Sanchez, alias Leonard Martinez Cruz: "Duke."

Date and Place of Birth: 11/6/32; Ciudad Juarez, Mexico (Chihuahua).

Nearest large city: El Paso, Texas.

Age: 19. Occupation: Laborer.

I am a citizen of: Mexico. I never was naturalized.

I never was married.

Father's name and birthplace: Petronilo Cruz, born in Mexico.

Father's present address: Deceased 1947, buried in Madera, California.

Exhibit A—(Continued)

Mother's maiden name and birthplace: Emelia Sanchez, born in Mexico.

Mother's name and address: Mrs. Amelia M. Cruz, 709 Washington St., Madera, California.

My parents are citizens of Mexico and never have been naturalized.

Was either parent ever in U. S.? Yes.

I last entered the U. S. at Calexico from Mexicali, Mexico, on or about March, 1950.

Manner of entry: By car as a passenger with several other fellows, whose names I do not remember.¹

I was going to join my mother.

For what purpose did you enter the U. S.? To resume residence and work.

I never had an immigration visa.

At the time of my last entry to the U. S. I could read the English language.

Prior to my last entry, I was inspected and admitted to the United States at El Paso, Texas, about 1933; with mother. [30]

¹"The inspector at Calexico investigated us for about 4 hours (had us waiting). Afterwards he permitted us to return to Los Angeles where I lived with my brother Santos Orta, on Verdugo Road, Los Angeles, California."

Exhibit A—(Continued)

Prior to my last entry, I resided in the U. S. as follows: All my life but a few months.

I was deported from the U. S. at: No.

Names and addresses of nearest relatives living abroad: None known.

I never have received public charity.

I never have used narcotics.

I have no official documents to prove my citizenship. But my mother must have my birth and baptismal certificates showing I was born in Mexico.

I was baptized at Ciudad Juarez, Chihuahua, Mexico; as an infant.

Names and addresses of persons in country of citizenship who know of my nativity or foreign residence are: Sister: Beatrice Cruz; c/o 709 Washington Street, Madera, California.

Foreign schools attended: None.

Foreign churches attended: Catholic.

Present Crime

I entered San Quentin May 14, 1952, from Madera County, California.

I pleaded guilty. Date of sentence: May 9, 1952.

Length of sentence: 1-15 yrs. & 1-10 yrs. C.S.

Exhibit A—(Continued)

Name of crime: Burg. 2nd. (459-P1) & Grand Theft (487-PC) CS.

When and where committed.....Fresno.

Case No. 2123.

Previous Crimes

Photograph:

Height: 5 ft. 6½ ins.; Wt.: 135 lbs.; Eyes: Brown;
Hair: Black; Complexion: Olive; Face: Round;
Nose: Reg.; Mouth: Reg.; Id. marks: Tats., Left
arm, upper, "RT"; Right arm, upper, "Duke."

/s/ LEONARD M. CRUZ,
Alien's Signature.

Subscribed and sworn to before:

/s/ E. H. PRATHER,
United States Immigrant
Inspector. [31]

F. B. I. and California State C. I. I. Summary of Criminal Record as Compiled by the Identification Department, California State Prison, San Quentin, California: M 31—IOM 14; I 28—III 16.

Mexican: 5 ft. 8 ins. 142 lbs. Born in Mexico, 1933.
Leonard Martinez Cruz. Alias: "Duke."

Cruz, Leonard M.

Exhibit A—(Continued)

Prison Number: A-21253.

F. B. I. Number:

C. I. I. Number: 668205.

Date: 11-27-51.

Department and Number: So. Madera, Calif.,
No. 17087.

Charge: Mal. Misch.

Disposition: 12-7-51, 30 days. C. J.

Date: 3-21-52.

Department and Number: So. Madera, Calif.,
No. 17087.

Charge: G. T.

Disposition: [Blank.]

Date: 5-14-52.

Department and Number: SPSQ., California,
No. A-21253.

Charge: Burg. 2nd. (459-PC) & G. T. (487-
PC).

Disposition: From Madera Co.; Term, 1-15
yrs. & 1-10 yrs. CS.

C. V. BRENNAN,
Identification Officer.

Exhibit A—(Continued)

In the Superior Court of the State of California
in and for the County of Madera

THE PEOPLE OF THE STATE OF CALIFOR-
NIA,

Plaintiff,

vs.

LEONARD M. CRUZ, ROBERT ALVISO,
FRANK MAESTAS, RICHARD RAMIREZ
and CELERINO QUINTERO,

Defendants.

INFORMATION

Count One:

The District Attorney of the County of Madera, State of California, hereby accuses Leonard M. Cruz, Robert Alviso and Celerino Quintero of a felony, to wit, Burglary, in that on or about the 21st day of March, 1952, in the County of Madera, State of California, they did wilfully, feloniously and unlawfully enter a building identified as "Hartwig Motors," situate at 301 South "E" Street, in the City of Madera, County of Madera, State of California, with intent to commit larceny therein.

Count Two:

And the District Attorney of the County of Madera, State of California, hereby further accuses Leonard M. Cruz, by this Second Count of this Information, of a felony, to wit: Grand Theft, in

Exhibit A—(Continued)

that on or about the 21st day of March, 1952, in the County of Madera, State of California, he did wilfully, feloniously and unlawfully take the property of the said A. J. Hartwig, consisting of a motor vehicle, to wit, a 1951 Dodge.

Count Three:

And the District Attorney of the County of Madera, State of California, hereby further accuses Robert Alviso, by this [33] Third Count of this Information, of a felony, to wit: Grand Theft, in that on or about the 21st day of March, 1952, in the County of Madera, State of California, he did wilfully, feloniously and unlawfully take the property of the said A. J. Hartwig, consisting of a motor vehicle, to wit: A 1950 Pontiac.

Count Four:

And the said District Attorney of the County of Madera, State of California, hereby further accuses Frank Maestas, by this Fourth Count of this Information, of a felony, to wit: Grand Theft, in that on or about the 21st day of March, 1952, in the County of Madera, State of California, he did wilfully, feloniously and unlawfully take the property of Dr. G. G. Daggett, consisting of a motor vehicle, to wit: A 1949 Cadillac.

Count Five:

And the said District Attorney of the County of Madera, State of California, hereby further ac-

Exhibit A—(Continued)

cuses Richard Ramirez, by this Fifth Count of this Information, of a felony, to wit: Grand Theft, in that on or about the 21st day of March, 1952, in the County of Madera, State of California, he did wilfully, feloniously and unlawfully take the property of the said A. J. Hartwig, consisting of a motor vehicle, to wit: A 1942 Jeep.

Count Six:

And the said District Attorney of the County of Madera, State of California, hereby further accuses Celerino Quintero, by this Sixth Count of this Information, of a felony, to wit: Grand Theft, in that on or about the 21st day of March, 1952, in the County of Madera, State of California, he did wilfully, feloniously and unlawfully take the property of the said A. J. Hartwig, consisting of a motor vehicle, to wit: A 1948 Pontiac.

Count Seven:

And the said District Attorney of the County of Madera, State of California, hereby further accuses Frank Maestas and [34] Richard Ramirez, by this Seventh Count of this Information, of a felony, to wit: Violation of Subdivision "A" of Section 449 of the Penal Code of California, in that on or about the 21st day of March, 1952, in the County of Madera, State of California, they did wilfully and unlawfully and maliciously set fire to and did burn a certain motor vehicle, to wit: A 1949 Ford.

Exhibit A—(Continued)

And all of the acts alleged in Counts One, Two, Three, Four, Five, Six and Seven of this Information were connected together in their commission.

Dated: April 17, 1952.

WALTER CHANDLER,
District Attorney for the County of Madera, State
of California.

Certified true copy.

[Endorsed]: Filed April 17, 1952. (Superior
Court.) [35]

In the Superior Court of the State of California
in and for the County of Madera

Case No. 2123

ABSTRACT OF JUDGMENT
(Commitment to State Prison as Provided
by Penal Code Section 1213.5)

THE PEOPLE OF THE STATE OF CALIFOR-
NIA,

vs.

LEONARD M. CRUZ, ROBERT ALVISO,
FRANK MAESTOS, RICHARD RAMIREZ
and CELERINO QUINTERO,

Defendants.

Exhibit A—(Continued)

HON. STANLEY MURRAY,
(Judge of Superior Court.)

WALTER L. CHANDLER,
(District Attorney.)

LOUIS W. CAPORALE, JR.,
(Counsel for Defendant.)

This certifies that on the 9th day of May, 1952, judgment of conviction of the above-named defendant, Leonard M. Cruz, was entered as follows:

In Case No. 2123, Count No. 1, he was convicted by Court on his plea of Guilty of the crime of Burglary, in the Second Degree, as charged in the Information, in violation of Section 459 of the Penal Code of California.

Defendant was not charged and admitted being, or was found to have been armed with a deadly weapon at the time of commission of the offense, or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Sections 969c and 3024. [36]

This Certifies that on the 9th day of May, 1952, judgment of conviction of the above-named defendant was entered as follows:

In Case No. 2123, Count No. 2, he was convicted by Court on his plea of Guilty of the crime of Grand Theft in violation of Section 484 of the Penal Code of California.

Exhibit A—(Continued)

Defendant was not charged and admitted being, or was found to have been armed with a deadly weapon at the time of commission of the offense, or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Sections 969c and 3024. [37]

Defendant was not adjudged a habitual criminal within the meaning of Subdivision . . . of Section 644 of the Penal Code; and the defendant is not a habitual criminal in accordance with Subdivision (c) of that Section.

It Is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison of the State of California for the term provided by law, and that he be remanded to the Sheriff of the County of Madera and by him delivered to the Director of Corrections of the State of California at the place hereinafter designated.

It is ordered that sentences shall be served in respect to one another as follows: Consecutively and not concurrently.

To the Sheriff of the County of Madera and to the
Director of Corrections:

Pursuant to the aforesaid judgment, this is to command you, the said Sheriff, to deliver the above-named defendant into the custody of the Director

Exhibit A—(Continued)
of Corrections at San Quentin at your earliest convenience.

Witness my hand and seal of said court this 9th day of May, 1952.

[Seal] ERMA E. CHEUVRONT,
Clerk.

State of California,
County of Madera—ss.

I do hereby certify the foregoing to be a true and correct abstract of the judgment duly made and entered on the minutes of the Superior Court in the above-entitled action as provided by Penal Code Section 1213.

Attest my hand and seal of the said Superior Court this 12th day of May, 1952.

[Seal] ERMA E. CHEUVRONT,
County Clerk and Ex Officio Clerk of the Superior
Court of the State of California in and for the
County of Madera.

The Honorable:

STANLEY MURRAY,
Judge of the Superior Court of the State of California, in and for the County of Madera.

Certified true copy.

[Endorsed]: Filed May 12, 1952. (Superior [38] Court.)

EXHIBIT B

AFFIDAVIT OF DETAINING OFFICER

State of California,
County of Los Angeles—ss.

Robert H. Robinson, being duly sworn, deposes and says that:

Albert Del Guercio, named as one of the respondents in the foregoing action, has been detailed to duty in Washington, D. C., and is not presently serving as Officer in Charge, Immigration and Naturalization Service, Los Angeles, California;

That affiant is acting as Officer in Charge, Immigration and Naturalization Service, Los Angeles, California, and as such officer, is charged with the detention of the petitioner in the above-entitled action; that the petitioner is being held for deportation on a warrant issued pursuant to an order of the Board of Immigration Appeals, said decision being dated July 16, 1953; that affiant is the proper party to be named as respondent in the above-entitled action in the place and stead of Albert Del Guercio; that affiant has read the Return to Order to Show Cause and Answer to Petition for Writ of Habeas Corpus filed in this matter, and by reference incorporates the same herein as if set forth in full.

Dated: August 18th, 1955.

/s/ ROBERT H. ROBINSON,
Affiant.

Subscribed and sworn to before me this 18th day of August, 1955.

[Seal] /s/ JOHN A. CHILDRESS,
Clerk, U. S. District Court;

By /s/ SAMUEL HOZMAN,
Deputy Clerk. [39]

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 19, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter came on regularly for hearing upon the Return to Order to Show Cause on September 12, 1955, in the above-entitled Court before the Honorable William M. Byrne, Judge, presiding, without a jury. The Petitioner being present in person and represented by his attorney, Richard R. Cody, and the Respondents being represented by their attorneys, Laughlin E. Waters, United States Attorney; Max F. Deutz and Edwin H. Armstrong, Assistants United States Attorney, by Edwin H. Armstrong; and counsel for both Petitioner and Respondents having Stipulated that the certified record of the Deportation Proceedings relating to Petitioner attached to the Return as an Exhibit, is a true and correct copy of the Proceedings of Deportation and should be received in evi-

dence in the trial of the instant action, and the Court having received the same; and [41] counsel for both Petitioner and Respondents having Stipulated that it be deemed that the Writ of Habeas Corpus had issued and that the hearing on the Order to Show Cause is the hearing on the Writ, that the Return to the Order to Show Cause be deemed the Return to the Writ of Habeas Corpus, and that the Return to the Habeas Corpus had been traversed; and that the Petitioner was present in Court at the time of the hearing on the Order to Show Cause and Writ; and the Court having reviewed the aforementioned Record of Deportation Proceedings relating to Petitioner, and having heard evidence and considered the arguments of counsel, both written and oral, and having taken the matter under submission, now hereby make the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

Petitioner, Leonard Cruz-Sanchez, is an alien, a native and citizen of Mexico.

II.

On June 27, 1952, a warrant of arrest was issued by the District Director, Immigration and Naturalization Service, Los Angeles, California, and served on July 21, 1952, charging that the Petitioner had been convicted and sentenced in this country of a crime involving moral turpitude committed within

five years after entry, to wit: Burglary, second degree, and grand theft. Said crimes being committed after May 1, 1917, and, further, that at the time of entry the immigrant was not in possession of a valid visa and not exempt from presentation thereof.

III.

Pursuant to the aforementioned warrant of arrest, Deportation Hearings were held at the California Institution for Men at Chino, California, on March 5, 1953, and on that date the Special Inquiry Officer who presided at these hearings rendered [42] his decision, ordering that Petitioner be deported from the United States pursuant to law on the charge contained in the warrant of arrest.

IV.

An administrative appeal was taken by Petitioner from said decision of the Special Inquiry Officer to the Board of Immigration Appeals and on July 16, 1953, said Board dismissed Petitioner's appeal.

V.

On August 13, 1953, based upon the aforementioned Order of Deportation, a Warrant of Deportation was issued by the District Director, Immigration and Naturalization Service, Los Angeles, California, directing the deportation of Petitioner.

VI.

The Special Inquiry Officer presiding at the aforementioned Deportation Hearings had jurisdiction and authority to act.

VII.

The Petitioner, Leonard Cruz-Sanchez, last entered the United States at Calexico, California, about March, 1950.

VIII.

There is reasonable, substantial, and probative evidence to support the decision of deportability, the Order of Deportation, and the Warrant of Deportation.

IX.

The Deportation Proceedings including the hearing and final order complied with the conditions and provisions of Section 242(b) of the Immigration and Nationality Act, 8 U.S.C. 1252(b).

X.

The Deportation Proceedings relating to the Petitioner were fair and in accord with his constitutional rights.

XI.

That Robert H. Robinson is the Officer in Charge of the [43] Immigration and Naturalization Service, Los Angeles, California, and as such has authority under the law and regulations to execute the Order of Deportation now outstanding against the Petitioner.

XII.

At the time of the hearing on the Order to Show Cause and the Writ of Habeas Corpus, the Petitioner, Leonard Cruz-Sanchez, was present in the Courtroom.

Conclusions of Law

I.

This Court has jurisdiction of the within cause under the provisions of Section 10 of the Act of June 11, 1946 (Administrative Procedure Act), 60 Stat. 243, 5 U.S.C.A., Section 1009.

II.

There is reasonable, substantial and probative evidence to support the Order of Deportation against Petitioner, and the Deportation Proceedings relating to Petitioner were fair and in accord with his constitutional rights.

III.

The Order of Deportation against Petitioner is valid and Petitioner is deportable under said Order.

IV.

The Deportation Proceedings, including the hearing and final order complied with the conditions and provisions of Section 244(b) of the Immigration and Nationality Act, 8 U.S.C. 1252(b).

V.

Judgment should be entered in favor of the Respondents and against the Petitioner denying the relief prayed for in Petitioner's Petition, and the Writ discharged.

Dated: This 22nd day of September, 1955.

/s/ W. M. BYRNE,

United States District [44]

Judge.

Presented by:

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ EDWIN H. ARMSTRONG,
Assistant U. S. Attorney,
Attorneys for Respondents.

Approved as to Form: Pursuant to Local Rule
7(a) this 22nd day of September, 1955.

/s/ RICHARD R. CODY,
Attorney for Petitioner.

[Endorsed]: Filed Sept. 22, 1955. [45]

United States District Court, Southern District of
California, Central Division
Civil No. 18554-WB

LEONARD CRUZ-SANCHEZ,

Petitioner,

vs.

ALBERT DEL GUERCIO, Officer in Charge, Im-
migration and Naturalization Service, Los An-
geles, California; MERRIL O'TOOLE, Re-
gional Commissioner, San Pedro, Calif.,

Respondents.

JUDGMENT

The above-entitled matter came on regularly for
trial on September 12, 1955, in the above-entitled

Court before the Honorable William M. Byrne, Judge, presiding, without a jury, the Petitioner being present in person and represented by his attorney, Richard R. Cody, and the Respondents being represented by their attorneys, Laughlin E. Waters, United States Attorney; Max F. Deutz and Edwin H. Armstrong, Assistants United States Attorney, by Edwin H. Armstrong; and counsel for both Petitioner and Respondents having Stipulated that the certified record of the Deportation Proceedings relating to the Petitioner should be received in evidence in the trial of the instant action, and the Court having received the same; and it having been Stipulated between counsel for Petitioner and counsel for Respondents that it be deemed that the Writ of Habeas Corpus had issued and that the hearing on the Order to Show Cause is the hearing on the Writ, [46] that the Return to the Order to Show Cause be deemed the Return to the Writ of Habeas Corpus, and that the Return to the Habeas Corpus had been traversed; and the Court having reviewed the aforementioned Record of Deportation Proceedings relating to Petitioner, and having heard and considered arguments of counsel, both written and oral, and having heretofore made and filed its Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed as follows:

1. That the decision and Order of Deportation of the Special Inquiry Officer of March 5, 1953, re-

lating to Petitioner is valid and that Petitioner is deportable under the said Order.

2. That Judgment shall be entered in favor of Respondents and against the Petitioner denying the relief prayed for in the Petitioner's Petition, and discharging the Writ.

Dated: This 22nd day of September, 1955.

/s/ W. M. BYRNE,

Judge, United States District
Court.

Presented by:

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ EDWIN H. ARMSTRONG,
Assistant U. S. Attorney,
Attorneys for Respondents.

Approved as to Form: Pursuant to Rule 7(a)
(Local Rules) this 22nd day of September, 1955.

/s/ RICHARD R. CODY,
Attorney for Petitioner.

[Endorsed]: Filed, docketed and entered Sept.
22, 1955. [47]

[Title of District Court and Cause.]

**ACTION FOR DECLARATORY JUDGMENT
AND JUDICIAL REVIEW**

Comes now the Plaintiff and Petitioner above named and complains and alleges as follows:

I.

That this is an action for Declaratory Judgment under the Declaratory Judgment Act (28 U.S.C. 2201) and for the review of the final order of an administrative agency, to wit, the Immigration and Naturalization Service of the Department of Justice under the Administrative Procedure Act (5 U.S.C. 1001, et seq.).

II.

That the Plaintiff herein is 32 years of age, and is a native and citizen of Mexico, who last entered the United States at El Paso, Texas, during the year of 1923, when he was four months of age.

III.

That on June 4, 1952, Plaintiff was required to give a [48] statement before the Immigration and Naturalization Service at San Quentin, California, and at said time and place was not represented by counsel of his own choosing.

IV.

That as a result of said hearing, a Warrant of Arrest was issued by said Defendant and served on the Petitioner herein on July 21, 1952.

V.

That on March 5, 1953, Plaintiff was accorded a hearing to show cause as to why he should not be deported from the United States under the appropriate provisions of the Immigration and Naturalization Act of 1952.

VI.

That on the same date the Special Inquiry Officer rendered his decision ordering that Plaintiff be deported from the United States in the manner provided by law, on the charge contained on the Warrant of Arrest.

VII.

That no administrative appeal was taken by Plaintiff from this order due to his lack of knowledge and the fact that he was not fully informed of his rights in this matter.

VIII.

That the Deportation hearing held on March 5, 1953, and the Order of Deportation issued by the Special Inquiry Officer then presiding, was not based on reasonable, substantial, and probative evidence.

IX.

That said Deportation hearing was not fair and in accordance with Plaintiff's constitutional rights, in that the Warrant of Arrest upon which the Order of Deportation was based was issued upon the basis of a statement taken from Plaintiff in violation of his constitutional rights. [49]

X.

That said deportation hearing was held when Petitioner was not represented by counsel of his own choosing, and, therefore, is a violation of his constitutional rights under the Fourteenth Amendment of the Constitution.

XI.

That said hearing was held under such circumstances that Petitioner was placed under duress and fear, and was, therefore, a violation of his constitutional rights under the Fourteenth Amendment.

XII.

Thereafter on August 15, 1955, petitioner filed an application for the issuance of a Writ of Habeas Corpus to test the validity of the Administrative proceedings referred to in this complaint and the Deportation Order issued March 5, 1953. Following the issuance of the Writ, a hearing was held on September 12, 1955, in the United States District Court for the Southern District of California; that following said hearing an order was signed and filed on September 22, 1955, by the Judge of said Court decreeing the validity of the deportation order, discharging the Writ, and denying relief to the petitioner.

XIII.

That the Defendants herein are attempting to deport the Plaintiff from the United States in violation of his constitutional rights, and will do so unless this Honorable Court intervenes in his behalf.

Wherefore, Plaintiff prays for judgment as follows:

1. Declaring that the deportation hearing was unfair, null and void.
2. Declaring that the deportation order herein was null and void.
3. Declaring that the Plaintiff is not subject to [50] deportation on the basis of said hearing.
4. Restraining the Defendants and each of them, from taking Plaintiff into custody and deporting him.
5. Such other and further relief as to this Court may seem just and appropriate.

/s/ RICHARD R. CODY.

[Endorsed]: Filed Sept. 22, 1955. [51]

[Title of District Court and Cause.]

NOTICE OF MOTION AND
MOTION TO DISMISS

Notice of Motion

To the Petitioner Above Named and to Richard R. Cody, His Attorney:

You and Each of You Will Please Take Notice that the respondents, Robert Robinson and Merrill O'Toole, by and through the undersigned, will bring the following Motion to Dismiss on for hearing before the above-entitled Court, in the Courtroom of the Honorable William M. Byrne, United States District Judge, in the United States Post

Office and Courthouse Building, 312 North Spring Street, Los Angeles 12, California, on Monday, the 17th day of October, 1955, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated: This 5th day of October, 1955. [53]

Motion to Dismiss

Comes now the respondents, Robert Robinson and Merrill O'Toole, and moves this Honorable Court for the dismissal of the above-entitled action for the reason that this Court has no jurisdiction over the subject matter of this action. This motion is made pursuant to the authority set forth in the Federal Rules of Civil Procedure, Section 12(b)(1).

This Motion will be based upon the pleadings and the Memorandum of Law attached to this Motion.

Dated: This 5th day of October, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division;

EDWIN H. ARMSTRONG,
Assistant U. S. Attorney;

/s/ EDWIN H. ARMSTRONG,
Attorneys for Respondents.

[Endorsed]: Filed Oct. 5, 1955. [54]

United States District Court, Southern District of
California, Central Division

Civil No. 18785-WB

LEONARD CRUZ-SANCHEZ,

Petitioner,

vs.

ROBERT ROBINSON, Officer in Charge, Immigration and Naturalization Service, Los Angeles, California; MERRIL O'TOOLE, Regional Commissioner, San Pedro, California,

Respondents.

ORDER OF DISMISSAL

The above-entitled matter came on regularly for hearing on respondents' Motion to Dismiss on October 17, 1955, before the Honorable William M. Byrne, Judge, presiding. The petitioner being represented by his attorney, Richard R. Cody, and the respondents being represented by their attorneys, Laughlin E. Waters, United States Attorney; Max F. Deutz and Edwin H. Armstrong, Assistants United States Attorney, by Edwin H. Armstrong, and having considered the respondents' motion memoranda of counsel in regard thereto, together with all the records and files herein; and the Court having taken said motion under submission, and being fully advised in the premises;

Now, Therefore, It is Hereby Ordered that the Petition for Declaratory Judgment and Judicial

Review on file herein be and same is hereby dismissed for failure to set forth a claim upon [62] which relief can be granted [Rule 12(b)(6), Federal Rules of Civil Procedure].

Dated: This 16th day of December, 1955.

/s/ W. M. BYRNE,

United States District Judge.

Affidavit of Service by Mail attached.

Lodged Nov. 28, 1955.

[Endorsed]: Filed, docketed and entered Dec. 16, 1955. [63]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Leonard Cruz-Sanchez, Petitioner, above named, hereby appeals to the Court of Appeals for the 9th Circuit from the Order of Dismissal entered in this Action on the 16th day of December, 1955, in favor of Respondents and against the Petitioner.

Dated: Dec. 20, 1955.

/s/ RICHARD R. CODY,

Attorney at Law.

[Endorsed]: Filed Dec. 20, 1955. [65]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered 1 to 261, inclusive, contain the original:

Petition for Writ of Habeas Corpus (18554-WB);

Order to Show Cause (18554-WB);

Return to Order to Show Cause (18554-WB);

Findings of Fact and Conclusions of Law (18554-WB);

Judgment (18554-WB);

Action for Declaratory Judgment and Judicial Review (18785-WB);

Motion and Notice of Motion to Dismiss (18785-WB);

Opposition to Motion to Dismiss (18785-WB);

Order of Dismissal (18785-WB);

Notice of Appeal (18785-WB);

Affidavit for Additional Time to Docket Appeal (18785-WB);

Designation of Record on Appeal (18785-WB);

Counter-Designation of Record on Appeal (18785-WB);

Amended Counter-Designation of Record on Appeal (18785-WB);

constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellants.

Witness my hand and the seal of said District Court, this 9th day of February, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15037. United States Court of Appeals for the Ninth Circuit. Leonard Cruz-Sanchez, Appellant, vs. Robert Robinson, Officer in Charge, Immigration and Naturalization Service, Los Angeles, California, and Merrill O'Toole, Regional Commissioner, San Pedro, California, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 20, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15037

LEONARD CRUZ-SANCHEZ,

Petitioner,

vs.

ROBERT ROBINSON, Officer in Charge, Immigration and Naturalization Service, Los Angeles, California; MERRIL O'TOOLE, Regional Commissioner, San Pedro, California,

Respondents.

STATEMENT OF POINTS
ON APPEAL

Pursuant to Rule 75 (d) of the Rules of Civil Procedure, the Petitioner-Appellant hereby states the points on which he intends to rely on his appeal from the final judgment herein as follows:

“Habeas Corpus Not Exclusive Relief From Administrative Order of Deportation.”

“Denial of Habeas Corpus No Bar Nor Does It Estop Relief Under Section 10 of Administrative Procedure Act.”

“Relief of Judicial Review of Order of Deportation Is Grant by Congress to Alien in Addition to Habeas Corpus Provided by Constitu-

THE HISTORY OF THE UNITED STATES

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2. The second part of the history of the United States is the period from the establishment of the first permanent settlements in 1607 to the American Revolution in 1776.

3. The third part of the history of the United States is the period from the American Revolution in 1776 to the present time.

4. The fourth part of the history of the United States is the period from the present time to the future.

5. The fifth part of the history of the United States is the period from the future to the end of the world.

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Co. 15037

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

LEONARD CRUZ-SANCHEZ,

Appellant,

VS

ROBERT ROBINSON,

Appellee.

Appeal from the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

STATEMENT OF PLEADINGS AND JURISDICTIONAL FACTS

A verified petition entitled "PETITION FOR
WRIT OF HABEAS CORPUS" was filed August 15, 1953,
in the District Court for the Southern District of

Service, Los Angeles, California; and MERRILL O'TOOLE,
Regional Commissioner, San Pedro, California.

The Petition alleged that an order of Deportation for the Petitioner's deportation had been issued that he feared that he would be deported from the United States without due process of law. (4). Further that petitioner did not receive notice of his impending deportation until all numbers in brackets refer to pages in transcript August 10, 1955; and that petitioner had been unable to secure or retain Counsel for the purpose of examining the record or file in his case.

On the basis of the petition filed, in order to show cause was issued and served on appellee by which said appellee was required to show cause why a writ of habeas corpus should not issue as prayed by said petition. (5).

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Findings of fact and conclusions of law were made and a judgment was entered in favor of respondents and against the Petitioner denying the relief prayed for in Petitioner's Petition, and the Writ discharged. (62).

On September 22, 1956, Petitioner herein filed an action entitled "ACTION FOR DECLARATORY JUDGMENT AND JUDICIAL REVIEW". (66). In this petition Petitioner alleged the jurisdictional facts under the Declaratory Judgments Act (Act of June 14, 1934, as amended, Title 28, U.S.C.A. 2201, et seq.) (66).

The complaint alleged that on June 4, 1952, Plaintiff was required to give a statement before the Immigration and Naturalization Service at San Quentin, California, and at said time and place was not represented by counsel of his own choosing. (66).

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was based on an unfair hearing. (67). That said hearing was held under such circumstances that Petitioner was placed under duress and fear, and was therefore, a violation of his constitutional rights under the Fourteenth Amendment to the Constitution of the United States. (68).

On December 16, 1955 appelle filed his Notice of Motion to Dismiss, etc. (60-70), pursuant to Rule 12(b) (1), Federal Rules of Civil Procedure on the grounds that the Court had no jurisdiction over the subject matter of the action.

The Honorable Wm. M. Bryne, District Judge, granted the motion to dismiss and made and signed the Order of Dismissal on ground of failure to set forth a claim upon which relief can be granted (Rule 12(b) (6), Federal Rules of Civil Procedure). (72).

The United States Court of Appeals for the Ninth.

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STATEMENT OF THE CASE

Appellant was born in Mexico, of which country he is a national. He was first admitted to the United States as a child of a few months of age in 1933. He has resided continuously in the United States since that time except for a brief visit of a few hours to Mexico prior to his last entry. His last entry which was not verified was claimed to be March, 1950, at Calexico, California. It was on the basis of this entry that the Immigration Service charged that he was deportable from the United States in that he entered with an Immigration visa and that he had been convicted of crime and sentenced to imprisonment for one year within five years after entry.

The record shows that the appellant pleaded guilty in the Superior Court of the State of California, in and for the County of Madera, to the

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On July 21, 1952, the appellant was served with a Warrant for his Arrest by E. T. PRATHER, an investigator of the Immigration Service while he was serving time on the above mentioned offense. (42-44).

On December 30, 1952, while still in custody of the State authorities, appellant received a registered letter which advised him that pursuant to the warrant of arrest served on July 21, 1952, he was to appear in the California State Prison, Chino, California, on January 26, 1952 at 10:30 a.m., for a hearing to enable him to show cause why he should not be deported from the United States in conformity with law. (32).

The hearing was finally held on March 5, 1953 at the California Institute for Men, Chino, California, and is set forth in full on Page 34 of the record.

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must have been considerable discussion concerning the case between the appellant and the hearing officer that does not appear on the record of the hearing. (36).

It was on the basis of this hearing that the Warrant of Deportation was issued.

Since the appellant was in immediate danger of being deported under said order, attorney for appellant filed the petition for the Writ of Habeas Corpus as mentioned heretofore. After the District Court discharged the Writ and denied relief to the petitioner, the action for Declaratory Judgment was filed and subsequently dismissed as heretofore set out.

SPECIFICATIONS OF ERROR

The appellant makes the following specifications of error of the District Court:

I.

The District Court erred in making said judgment

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the relationship of the household to the community.

provisions of the Administrative procedure Act in addition to the Constitutional relief of habeas corpus because of the extreme limitations of review in the latter and its desire to insure aliens a full and complete opportunity to secure justice and avoid deportation of worthy aliens victims of error and deception.

III.

The District Court erred in dissolving the temporary restraining order because in so doing it denied appellant the right to secure relief while at liberty as Congress provided.

ARGUMENT

HABEAS CORPUS NOT EXCLUSIVE RELIEF FROM ADMINISTRATIVE ORDER OF DEPORTATION.

RELIEF OF JUDICIAL REVIEW OF ORDER OF DEPORTATION

IS GRANTED BY CONGRESS TO ALIEN IN ADMINISTRATIVE

RELIEF UNDER SECTION 10 OF ADMINISTRATIVE

PROCEDURE ACT.

RELIEF OF JUDICIAL REVIEW OF ORDER OF DEPORTATION

IS GRANTED BY CONGRESS TO ALIEN IN ADMINISTRATIVE

ure Act of 1946 (Act of June 11, 1946, 60 Stat. 237, et seq.), the only legal procedure available to an alien to test the validity of an administrative order of deportation was petition for writ of habeas corpus, Bridges vs Dixon, 326, U.S. 133, a right guaranteed by Art. I, Sec 9, Clause 2, of the Constitution which reads: "The privilege of the Writ of Habeas Corpus shall not be suspended...". The review, traditionally limited, primarily related to a determination of due process. Eagles vs Samuels, 349 U.S. 304, 511.

Sung vs McGrath, 339 U.S. 53, held that the Administrative procedure Act, supra, was applicable to deportation cases. Thereupon, Congress expressed its will, intention and purpose by exempting proceedings before the Immigration Service from provisions of Sections 3, 7, and 8 of the Administrative Procedure Act (84 Stat. 1048), hereinafter designated as the APA for convenience of all. This exemption by Congress was in accord with Section 12 of the APA "...No subsequent legislation shall be held to supersede or modify the provisions of

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General to deport an alien. However, Heikkila was specifically not a ruling in the 1952 Immigration and Naturalization Act (65 Stat. 163), see Heikkila v. Barber, supra, footnote 4.

Pedreiro v. Shughnessy, 347 U.S. 48, has held that an alien may, under the 1952 Act, secure injunctive relief under the provisions of Section 10 of AIA, supra. The remedy, said the Supreme Court is an appropriate one and an alien is not limited to review by habeas corpus. It is further held that the Attorney General was not an indispensable party to the action.

Moreover, Pedreiro declared that a second action would not injure the Government, but, sub silentio, could assist an alien.

The foregoing brief chronology shows that we must presume that Congress originally intended to grant judicial review to aliens in record with AIA; changed its mind by specifically withdrawing the privilege, supra; and then in the 1952 Act, Congress reinstated the privilege.

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llant's complaint is concerned, that, as of September 22, 1955, the date of its filing (69), the Supreme Court has decreed that the existing will, purpose and intention of Congress was to extend the relief of judicial review.

Pedreiro v. Chungweisy, supra. It follows the trial court had jurisdiction, providing that appellant was not barred or estopped from asserting same by the prior adverse ruling on his habeas corpus petition.

When the APA was enacted in 1946, the Constitutional guarantee of habeas corpus, supra, was available. It was available continuously during the period such Congress was wavering in its position. It would be preposterous for anyone to argue that Congress was mindful of the Constitutional guarantee or that Congress intended to substitute judicial review under APA for the review required by the Constitution.

It is the intention of Congress under the APA Act, supra, to grant an appeal the additional remedy of judicial review and innovative relief under Section 10 of the APA.

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For one colleague and collaborator, the feeling
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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

"1. In view of the fact that every person who is ordered deported has all these administrative, procedures available, plus an appeal to the court, plus the right to a writ of habeas corpus..."

Congressman Walters, 94 Cong. Rec. 4415, 4416.

"The Administrative Procedure Act is made applicable to this bill. The A.P.A. prevails now."

Senator McCarren, 95 Cong. Rec. 3778.

Appellant's action for judicial review and injunction was filed in accord with the purpose and intention of Congress expressed both in the enacting and passage thereof.

Said law did not suspend the rights of habeas corpus nor could it; said law did not create the situation where two remedies were available, requiring an election, nor could it; said law did not state which procedure should come first as that would have to be determined by the originaries of each deportation matter.

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residence, where the doctrine of res judicata or any form of bar would be inconsistent with the expressed will of Congress (cf. Pedreira, supra) or the method devised and enacted by Congress, the doctrine will not be enforced by the courts. Denver Bldg. Trades v. McClain, Inc., 136 F.2d 326; reversed on other grounds in 341 U.S. 675.

When appellant filed his complaint, he was seeking a judicial review which applied a statutory standard of review which required the reviewing court to determine from the whole record whether there was substantial evidence to warrant the order of deportation. To the scope of review, Congress says he is entitled and the Supreme Court has approved.

Pedreira v. The County, supra

Ariston v. Michigan, 340 U.S. 163

Universal Camera Co. v. N.Y. City, 348 U.S. 401

Boyle v. Board, 345 U.S. 255, 258

The variety of the allegations of unconstitutional practices will be established beyond question by the scope of review required under section 10 of the Administrative Procedure

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On the 11th of September 1900 the following was published in the *London Standard* and *Times* newspapers:

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No. 15037

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEONARD CRUZ-SANCHEZ,

Appellant,

vs.

ROBERT ROBINSON, Officer in Charge, Immigration and
Naturalization Service, Los Angeles, California, MER-
RIL O'TOOLE, Regional Commissioner, San Pedro Cali-
fornia,

Appellees.

BRIEF FOR APPELLEES.

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MAX F. DEUTZ,
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FILED

SEP 15 1956

PAUL P. O'BRIEN, CLERK

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No. 15037

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEONARD CRUZ-SANCHEZ,

Appellant,

vs.

ROBERT ROBINSON, Officer in Charge, Immigration and
Naturalization Service, Los Angeles, California, MER-
RIL O'TOOLE, Regional Commissioner, San Pedro Cali-
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TOPICAL INDEX

	PAGE
Jurisdiction	1
Statement of the case.....	2
Statutes involved	5
Argument	6

I.

Summary	6
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II.

Appellant is entitled to judicial review by way of habeas corpus or by way of an action for declaratory relief but such remedies are mutually exclusive.....	7
--	---

III.

Where appellant seeks review on the same facts as previously determined on hearing on a writ of habeas corpus the doctrine of res judicata applies.....	9
Conclusion	12
Appendix I. Memorandum of Decision.....App. p.	1

TABLE OF AUTHORITIES CITED

CASES	PAGE
Beard v. Bennett, 114 F. 2d 578.....	11
Carpathiou v. Jordan, 153 F. 2d 810, cert. den. 328 U. S. 868....	11
Dorsey v. Gill, 148 F. 2d 857, cert. den. 325 U. S. 890.....	11
Heikkila v. Barber, 216 F. 2d 407, cert. den. 349 U. S. 927.....	9
Lapides v. Clark, 85 U. S. App. D.C. 101, 176 F. 2d 619, cert. den. 338 U. S. 860.....	9
Marcello v. Bonds, 349 U. S. 302.....	10
Shaughnessy v. Pedreiro, 349 U. S. 48.....	2, 7
United States ex rel. Dryzvitch v. Holton, 222 F. 2d 840.....	8
Wong Doo v. United States, 265 U. S. 239.....	10

STATUTES

Administrative Procedure Act, Sec. 10 (60 Stat. 243).....	2, 5, 8
Immigration and Nationality Act (66 Stat. 204, et seq.), Sec. 242(b)	5, 6, 7

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Appellees.

BRIEF FOR APPELLEES.

Jurisdiction.

On August 15, 1955, appellant, plaintiff below, sought a writ of habeas corpus in the District Court for the Southern District of California alleging that appellant was being detained unlawfully by appellees [R. 4].¹ The defendant at the time was Albert Del Guercio, Officer in Charge, Immigration and Naturalization Service, Los Angeles, California, and Merrill O'Toole, Regional Commissioner, San Pedro, California.

¹References to the printed Transcript of Record will be indicated "R." References to appellant's brief will be indicated "Br."

On September 12, 1955 a hearing was had in the District Court [R. 58] and a judgment was entered in favor of defendants denying the relief prayed for in the plaintiff's petition and the writ was discharged [R. 62].

Judgment denying such relief was filed, docketed and entered on September 22, 1955 [R. 65].

On September 22, 1955 plaintiff filed an action for declaratory judgment and judicial review [R. 66].

On October 5, 1955 defendants filed a notice of motion and motion to dismiss [R. 69].

On December 16, 1955 an order of dismissal was made by the Honorable William M. Byrne, District Judge, granting the motion to dismiss, which order was filed, docketed and entered on the same date [R. 71].

The court below had jurisdiction under the provisions of Section 10 of the Act of June 11, 1946 commonly referred to as the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. A., Section 1009 (*Shaughnessy v. Pedreiro*, 349 U. S. 48 (1955)); and its judgment being a final decision jurisdiction is conferred upon this court by 28 U. S. C., Section 1291.

Statement of the Case.

Appellant is an alien, a native and citizen of Mexico [R. 59, 45-46]. He was lawfully admitted to the United States in 1933 and has been a resident of the United States continuously since that time. On July 21, 1952 a warrant of arrest [R. 42] was issued by the District Director, Immigration and Naturalization Service, Los Angeles, California charging that the appellant was subject to deportation under the Immigration and Nationality Act in that he was an immigrant not in possession of a

valid immigration visa and not exempted from the presentation thereof by said Act or Regulations thereunder; and that after entry he was convicted of a crime involving moral turpitude committed within five years after said entry; to wit burglary, second degree, and grand theft [R. 42]. The last entry of appellant was in March, 1950 [R. 46].

The record shows that appellant pleaded guilty in the Superior Court of the State of California in and for the County of Madera for the crime of burglary in the second degree committed on or about March 21, 1952 and was sentenced by said court on May 9, 1952 to imprisonment in the State Prison for the term prescribed by law [R. 47-48; Br. 5].

On March 5, 1953 a deportation hearing was held at California Institute for Men, Chino, California [R. 34; Br. 6].

On March 5, 1953 the special inquiry officer who presided at the aforementioned deportation hearing rendered his decision ordering that the plaintiff be deported from the United States pursuant to law on the charge contained in the warrant of arrest. An administrative appeal was taken by appellant from the decision of the special inquiry officer to the Board of Immigration Appeals and on June 16, 1953 said Board dismissed appellant's appeal [R. 19].

On August 13, 1953, based upon the aforementioned order of deportation a warrant of deportation was issued [R. 17] by the District Director, Immigration and Naturalization Service, Los Angeles, California, directing that the appellant be deported from the United States.

On August 15, 1955 the plaintiff filed a petition for a writ of habeas corpus in the court below, seeking an order releasing plaintiff from detention [R. 3].

On August 15, 1955 an order to show cause was issued by the lower court for the defendant to show cause why a writ of habeas corpus should not issue. The show cause was set for September 6, 1955 [R. 5].

On September 12, 1955 a hearing on the order to show cause was held in the court below [R. 58] and a judgment was entered in favor of the appellee against appellant denying the relief prayed for in the appellant's petition and discharging the writ. Judgment was entered on September 22, 1955 [R. 63].

On September 22, 1955 plaintiff filed an action for declaratory judgment and judicial review in which petition plaintiff alleged that there had been a previous application for a writ of habeas corpus which had been denied [R. 68].

On October 5, 1955 defendants filed a notice of motion and motion to dismiss the petition for declaratory judgment pursuant to the authority set forth in Federal Rules of Civil Procedure, Section 12(b)(1) and on October 11, 1955 plaintiff filed a supplemental motion to dismiss on the grounds that the petition failed to state a claim on which relief could be granted pursuant to the authority set forth in Federal Rules of Civil Procedure, Section 12(b)(6).

On October 17, 1955 the court below Honorable William M. Byrne, Judge presiding, ordered the petition for declaratory relief dismissed [R. 71]. On November 17, 1955 the court filed a memorandum of decision (Appendix I).²

On December 20, 1955 plaintiff filed notice of appeal [R. 72]. This appeal from that judgment raises the following questions: (1) Is a habeas corpus an exclusive relief from an administrative order of deportation. (2) Is a denial of habeas corpus in a previous proceedings an estoppel for subsequent relief under Section 10 of Administrative Procedure Act. (3) Did Congress grant to an alien in addition to the rights to a writ of habeas corpus the relief of judicial review and is such right to relief of judicial review a constitutional right which Congress cannot suspend.

Statutes Involved.

Section 10 of the Act of June 11, 1946 (Administrative Procedure Act).

60 Stat. 243, 5 U. S. C. A., Section 1009, Section 242(b) of the Immigration and Nationality Act of 1952 (8 U. S. C. A. 1252(b)).

²The memorandum of decision of Judge William M. Byrne is attached hereto as Appendix I.

ARGUMENT.

I.

Summary.

The standard embodied in the Immigration and Nationality Act requiring reasonable, substantial and probative evidence to support an order of deportation is not new in deportation proceedings but was applied by courts prior to this Act in habeas corpus proceedings. In determining whether this standard has been met a court of review will not substitute its judgment for that of the Immigration authorities but will invalidate an order of deportation only if the alien would have been entitled to a directed verdict in his favor had the issue of his deportability been tried before a jury.

Following the issuance of the warrant for deportation of the alien a judicial review of the deportation proceedings was obtained by way of a petition for a writ of habeas corpus. No serious question is raised by the appellant as to the propriety of the hearing on the writ of habeas corpus and upon that hearing the court determined that the requirements of Section 242(b) of the Immigration and Nationality Act, 8 U. S. C. A. 1252(b) were met and that the hearing for deportation proceedings were fair and in accordance with the constitutional rights of the appellant. Further, the court found that there was reasonable, substantial and probative evidence to support the order of deportation and the deportation proceedings were fair and in accord with the constitutional rights of the petitioner.

The major question presented by this appeal is whether the appellant may have a redetermination of the same issues previously adjudicated on the hearing on the writ of

habeas corpus. It is contended by the appellant that he is entitled to identical judicial review in both a habeas corpus proceedings and in a subsequent declaratory relief action.

II.

Appellant Is Entitled to Judicial Review by Way of Habeas Corpus or by Way of an Action for Declaratory Relief, but Such Remedies Are Mutually Exclusive.

A finding by a court on a writ of habeas corpus conclusively establishes appellant's deportability and precludes his attempt to relitigate the matter by a declaratory relief action.

The present suit is in no sense a new action; the issues tendered here have already been disposed of in a prior litigation. It was determined by the court in this prior litigation that the petitioner had a fair hearing in accordance with his constitutional rights and that the provisions of Section 242(b) of the Immigration and Nationality Act, 8 U. S. C. A. 1252(b) had been complied with. This prior litigation conclusively established that the order of deportation was valid. This is so either upon the doctrine of *res judicata* or upon the legal principle that controlling weight should be given a prior judicial determination of the same issues between the same parties or their privies.

Appellant relies upon the authority of *Shaughnessy v. Pedreiro*, 349 U. S. 48 which he contends authorizes judicial review in both habeas corpus and declaratory relief and therefore he is entitled to *two* judicial reviews of the same administrative proceeding. While it is true that the *Pedreiro* case (*supra*) held, "That there is a right

of judicial review of deportation orders other than by habeas corpus” and that an action for declaratory relief is an appropriate remedy to obtain a review, this holding does not state that such remedies are consecutive. The clear holding is that judicial review may be had *either* by habeas corpus or an action for declaratory relief.

Jurisdiction of the court to review is predicated on Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. A. 1009(c). This Section provides in part:

“The form of proceeding for judicial review shall be . . . any applicable form of legal action (including actions for declaratory judgments or writs for prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction.”

The net effect of a petition for declaratory relief and judicial review is to seek from the court the same review as was had previously on a writ of habeas corpus. The scope of review on the writ of habeas corpus or the scope of review in an action for review under the Administrative Procedure Act is the same, irrespective of which procedure is employed. *United States of America ex rel. Dryzwitch v. Holton*, 222 F. 2d 840.

It could hardly be contended that Congress intended to permit successive judicial review of the same administrative action in each of the various forms authorized with resultant endless litigation and indefinite postponement of execution of administrative order.

III.

Where Appellant Seeks Review on the Same Facts as Previously Determined on Hearing on a Writ of Habeas Corpus the Doctrine of Res Judicata Applies.

There is no argument with the contention of the appellant that *res judicata* does not apply to habeas corpus. Appellees agree that this is the correct statement of the law. However, we are here faced not with an action for habeas corpus followed by a subsequent action for habeas corpus but rather with an action for habeas corpus followed by a different and entirely distinct action for declaratory relief. Cases which pass upon the proposition that habeas corpus proceedings are not bound by the rule of *res judicata* deal with existing habeas corpus cases and their relationship to prior habeas corpus cases. In the case of *Lapides v. Clark*, 176 F. 2d 619, 621 (1949), cert. den. 338 U. S. 860. The court stated that the appellant had overlooked the fact that the present action was for declaratory judgment and said:

“We wonder what justification there can be for this additional and needless litigation with all its trouble, expense and delay which the law so much abhors.”

In that case the court affirmed the District Court's order dismissing the complaint. A similar result was reached in *Heikkila v. Barber*, 216 F. 2d 407, 409 (9th Cir., 1954), cert. den. 349 U. S. 927 (1955). In that case the Court of Appeals held:

“Appellant's present suit is no real sense a new action. It is but a repetition or continuation of the litigation heretofore unsuccessfully urged. We have no alternative but to hold that the earlier decision of the Supreme Court is *res judicata*.”

Here too petitioner is attempting to repeat or recontinue the litigation which he heretofore unsuccessfully waged. There must be an end to litigation. *Wong Doo v. United States*, 265 U. S. 239.

In *Marcello v. Bonds*, 349 U. S. 302 the court discusses the various elements with respect to notice, right of counsel, right to present evidence and to cross-examine witnesses and provides that decisions of deportability shall be based upon reasonable, substantial and probative evidence. The scope of review is exactly the same, whether the remedy pursued is habeas corpus or an action for declaratory relief.

Even assuming *arguendo* that *res judicata* is not technically applicable the same result would be required by the controlling weight which must be given to the prior judicial determination of deportability. In *Wong Doo v. United States*, *supra*, the court after pointing out that *res judicata* did not apply in habeas corpus proceedings said:

“ . . . it plainly appears that the situation was one where, according to a sound judicial discretion, controlling weight must have been given to the prior refusal. The only ground on which the order for deportation was assailed in the second petition had been set up in the first petition. The petitioner had full opportunity to offer proof of it at the hearing of the first petitions; and if he was intending to rely on that ground, good faith required that he produce the proof then. To reserve the proof for use in supporting a later petition, if the first failed, was to make an abusive use of the writ of habeas corpus. No reason for not presenting the proof at the outset is offered. It has not been embodied in the record, but what is said of it there and in the briefs shows

that it was accessible all the time. If an alien whose deportation has been ordered can do what was attempted here, it is easy to see that he can postpone the execution of the order indefinitely. Here the execution has already been postponed almost four years."

In *Carpathiou v. Jordan*, 153 F. 2d 810, 811 (7th Cir., 1946), cert. den. 328 U. S. 868, the court in passing on successive writs of habeas corpus said:

"The District Court properly exercised its sound discretion in giving controlling weight to the prior decision and in dismissing the petition [citing cases]. Litigation must end and cannot be continued indefinitely in this manner [citing *Wong Doo v. United States, supra*]."

In the leading case of *Dorsey v. Gill*, 148 F. 2d 857, 869-870 (1945), cert. den. 325 U. S. 890, the court stated:

"Though the doctrine of *res judicata* does not apply to habeas corpus cases, the fact that the same issues have been decided in a former proceeding may and sometimes should as a matter of judicial discretion be given controlling weight."

To the same effect, see *Beard v. Bennett*, 114 F. 2d 578, 581 (1940), in which case the court stated:

". . . we think the fact that appellant has applied for substantially identical relief in another coordinate form having admitted jurisdiction practically contemporaneous with his application here and that such form had determined the application adversely to him should preclude him from having the relief which he seeks in this proceeding. The trial court unquestionably has discretion in such circumstances to decline to exercise his jurisdiction if it were admitted to exist."

Conclusion.

Wherefore, for the reasons set forth above it is respectfully submitted that the judgment of the District Court in favor of the appellee denying the relief prayed for in the appellant's petition should be affirmed.

Respectfully submitted,

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MAX F. DEUTZ,
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APPENDIX I.

United States District Court, Southern District of California, Central Division.

Leonard Cruz-Sanchez, Petitioner, vs. Robert Robinson, Officer in Charge, Immigration and Naturalization Service, Los Angeles, California, Merril O'Toole, Regional Commissioner, San Pedro, California, Respondents. No. 18785-WB.

Filed Nov. 17, 1955; Clerk, U. S. District Court, Southern District of California.

MEMORANDUM OF DECISION

Cruz-Sanchez filed this action for declaratory judgment seeking the review of a final order of the Immigration and Naturalization Service in which he was found to be a deportable alien and ordered deported from the United States.

The defendants, in their motion to dismiss, concede that an action for declaratory judgment is a proper form of proceeding to obtain judicial review of an order of deportation,¹ but they contend that no relief can be granted here as the claim of the plaintiff has previously been adjudicated, *i.e.* he has already had his judicial review.

Approximately two months prior to the filing of this action the plaintiff filed a petition for a writ of habeas corpus and was accorded a judicial review of the deportation proceedings he attacks in the present suit. Following a hearing on the writ and the return thereto, the court made and filed findings that the hearing and the final

¹Shaughnessy v. Pedreiro, 349 U. S. 48.

order of deportation complied with the conditions and provisions of Section 242(b) of the Immigration and Nationality Act (8 U. S. C. A. 1252(b)); that the deportation proceedings relating to the plaintiff were fair and in accord with his constitutional rights; that there was reasonable, substantial and probative evidence to support the decision of deportability, the order of deportation and the warrant of deportation. Accordingly judgment was entered discharging the writ.

The question here is whether Cruz-Sanchez may have a re-determination of the same issues previously adjudicated. He relies on *Shaughnessy v. Pedreiro*, 349 U. S. 48, and contends that it authorizes judicial review in both habeas corpus and declaratory relief and therefore he is entitled to *two* judicial reviews of the same administrative proceeding. That is not the holding of the *Pedreiro* case. The *Pedreiro* court held "that there is a right of judicial review of deportation orders other than by habeas corpus" and that an action for declaratory relief is an appropriate remedy to obtain such a review. The clear holding is that judicial review may be had *either* by habeas corpus *or* an action for declaratory relief. The Administrative Procedure Act provides² the "form of proceeding for judicial review shall be . . . any applicable form of legal action (including actions for declaratory judgments or writs for prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction." It could hardly be contended that Congress intended to permit successive judicial reviews of the same administrative action in each of the various forms author-

²5 U. S. C. A. 1009(b).

ized, with resultant endless litigation and the indefinite postponement of execution of the administrative order. The conclusion is inescapable that Congress intended but one judicial review of administrative action.

Cruz-Sanchez says it is elementary that the doctrine of *res judicata* does not apply to habeas corpus. That is a correct statement of the law³ which is founded upon the recognition of habeas corpus as the privileged writ of freedom. It is because of this status that courts are not foreclosed from considering successive applications for the extraordinary writ.⁴ However, we are not concerned with the application of the doctrine of *res judicata* to habeas corpus proceedings. This is an action for a declaratory judgment and not an application for the Great Writ.

Ordinarily the office of habeas corpus is exhausted when it is ascertained that the agency or court under whose order the petitioner is being held had jurisdiction to act and the requirements of due process were observed.⁵ Judicial review of an administrative proceeding may be

³Wong Doo v. United States, 265 U. S. 239; Salinger v. Loisel, 265 U. S. 224; Collins v. Loisel, 262 U. S. 426.

⁴To curtail the abuse of the writ, Congress in 1948 adopted Section 2244 of Title 28 U. S. C. A. reading as follows: "No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry." (See Revisor's Note to the effect that the purpose of the section is to prevent suing out successive and repetitious writs).

⁵Woolsey v. Best, 299 U. S. 1.

had in habeas corpus because the Administrative Procedure Act so provides (5 U. S. C. 1099(b)) and the scope of habeas corpus is enlarged accordingly. The scope of judicial review of deportation proceedings whether invoked by habeas corpus or an action for declaratory relief is delineated by section 242(b) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1252(b)). See *Marcello v. Bonds*, 349 U. S. 302. Section 242(b) sets forth various requirements with respect to notice, right to counsel, right to present evidence and to cross examine witnesses and provides that decisions of deportability shall be based upon reasonable, substantial and probative evidence. The scope of the review is exactly the same whether the remedy pursued is habeas corpus or an action for declaratory relief.

The plaintiff has been afforded judicial review and a court of competent jurisdiction has determined that the deportation proceedings complied with the conditions and provisions of Section 242(b). A judgment rendered by a court having jurisdiction of the parties and subject matter is conclusive and indisputable evidence as to all rights, questions, or facts put in issue in the suit and actually adjudicated therein, when the same come again into controversy between the same parties or their privies.⁶

Although the defense of *res judicata* should ordinarily be pleaded; where, as here, the complaint on its face shows the prior proceedings, such defense may be presented by motion to dismiss.⁷

⁶*Wyoming v. Colorado*, 286 U. S. 494; *Continental Oil Co. v. Jones*, 176 F. 2d 519; *Oklahoma v. United States*, 155 F. 2d 496; *Restatement, Judgments*, 568.

⁷*Cuff v. United States*, 64 F. 2d 624.

An alien is not entitled to repetitious judicial reviews of deportation proceedings. If discontented with the result of the first judicial review, his remedy is by appeal. The motion to dismiss is granted. Counsel for defendant to prepare, serve and lodge a formal order pursuant to local rule 7.

Dated, Los Angeles, California, November 17, 1955.

WM. M. BYRNE,

United States District Judge.

Received Nov. 17, 1955; U. S. Attorney, Los Angeles, Calif.

